No. 06-11612
Title: Homero Gonzalez, Petitioner
v.
United States
Docketed: June 5, 2007
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (05-40723)
Decision Date: March 30, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 24 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 5, 2007)
Jun 27 2007	Order extending time to file response to petition to and including August 6, 2007.
Aug 6 2007	Brief of respondent United States in opposition filed.
Aug 9 2007	Reply of petitioner Homero Gonzalez filed.
Aug 16 2007	DISTRIBUTED for Conference of September 24, 2007.
Sep 25 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following Questions: "1) Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire? 2) Did the court of appeals err when it reviewed petitioner's objection for plain error?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Nov 5 2007	Joint appendix filed. (Statement of costs filed)
Nov 5 2007	Brief of petitioner Homero Gonzalez filed.
Nov 9 2007	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Nov 12 2007	Brief amicus curiae of Charles Hamilton Houston Institute for Race and Justice filed.
Nov 16 2007	SET FOR ARGUMENT ON Tuesday, January 8, 2008.
Nov 19 2007	CIRCULATED.
Dec 3 2007	Brief of respondent United States filed. (Distributed)
Dec 19 2007	Reply of petitioner Homero Gonzalez filed. (Distributed)
Dec 26 2007	Record received from the U.S.C.A. for 5th Circuit. (1 envelope)
Jan 3 2008	Record received from the U.S.D.C. for the Southern District of Texas (Laredo Division) (1 box)
Jan 8 2008	Argued. For petitioner: Brent E. Newton, Assistant Federal Public Defender, Houston, Tex. For respondent: Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

7

06-11612

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

HOMERO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

BRENT E. NEWTON
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 310
Houston, Texas 77002-1634
Telephone: (713) 718-4600

QUESTION PRESENTED

Petitioner, a Mexican citizen who does not speak English, was represented by counsel at his federal drug-trafficking trial. After appearing before a United States district judge at several pretrial conferences, petitioner was brought before a United States magistrate judge for jury selection. At a bench conference outside of petitioner's presence and before petitioner had the assistance of an interpreter, defense counsel orally consented to the magistrate judge's presiding over the jury selection process. Thereafter, the magistrate judge did not obtain petitioner's consent or even mention that his attorney had consented outside of his presence. Based on the foregoing, the question presented is as follows:

> Is a federal criminal defendant's counsel's oral consent to have a United States magistrate judge preside over jury selection binding on the defendant when the record does not reflect the defendant's own knowing and voluntary waiver of his constitutional right to have an Article III judge preside over jury selection?

Several United States Courts of Appeals have addressed this issue and have issued conflicting decisions.

PARTIES TO THE PROCEEDING

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

PRAYER 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

BASIS OF FEDERAL JURISDICTION 4

REASONS FOR GRANTING THE WRIT 12

This Court should grant certiorari and resolve the division among several circuit courts concerning whether a federal criminal defendant must personally consent to a United States magistrate judge's presiding over jury selection or whether consent from the defendant's counsel by itself is sufficient to satisfy Article III's requirements. 12

Conclusion 20

APPENDIX A: Opinion of the Court of Appeals in United States v. Gonzalez, 483 F.3d 390, (5th Cir. 2007) 21

APPENDIX B: Judgment of the district court in United States v. Gonzalez, No. 5:04CR1763-S-001 (S.D. Tex. May 2, 2005) 26

APPENDIX C: Excerpt from jury selection transcript 33

TABLE OF CITATIONS

Page

CASES

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed. 2d 274 (1969) 18

Brookhart v. Janis, 384 U.S. 1 (1966) 17

Commodities Future Trading Comm'n v. Schor, 478 U.S. 833 (1986) 17-18

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed. 2d 491 (1968) 18

Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L.Ed. 2d 671 (1962) 10

Gomez v. United States, 490 U.S. 858 (1989) 12, 14, 16-17

Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir.1989) 16

Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709, 19 L.Ed. 2d 906 (1968) 10

Harris v. Folk Construction Company, 138 F.3d 365 (8th Cir. 1998) 13, 19

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L.Ed. 1037 (1941) 10

Johnson v. Zerbst, 304 U.S. 458 (1938) 14, 17

NLRB v. A-Plus Roofing, 39 F.3d 1410 (9th Cir. 1994), reh'g en banc on other grounds, 133 F.3d 704 (9th Cir. 1998), vacated on other grounds, 525 U.S. 801 (1998), on remand, 165 F.3d 689 (9th Cir. 1999) 15

New York v. Hill, 528 U.S. 110 (2000) 17

Norris v. Schotten, 146 F.3d 314 (6th Cir. 1998) 14

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 18

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

Patton v. United States, 281 U.S. 276 (1930), overruled on other grounds, Williams v. Florida, 399 U.S. 78 (1970) 17

Peretz v. United States, 501 U.S. 923 (1991) 9, 11-18

United States v. Desir, 273 F.3d 39 (1st Cir. 2001) 13

United States v. Dobey, 751 F.2d 1140 (10th Cir. 1985) 14

United States v. Foster, 57 F.3d 727 (9th Cir. 1995) 15

United States v. Frechette, 456 U.S. 1 (1st Cir. 2006) 18

United States v. Gamba, ___ F.3d ___, 2007 WL 1063147 (9th Cir. Apr. 11, 2007) reh'g en banc denied, No. 06-35021 (9th Cir. May 22, 2007) 14-15, 17, 19

United States v. Gomez-Lepe, 207 F.3d 623 (9th Cir. 2000) 15

United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007) . . . . . iii, 1, 7-8, 11, 13-14, 18

United States v. Jones, 938 F.2d 737 (7th Cir. 1991) 9, 13

United States v. Maragh, 174 F.3d 1202 (11th Cir. 1999), supplemental op. on reh'g 189 F.3d 1315 (11th Cir. 1999) . . . . . 6, 1[illegible]6

United States v. Maragh, 189 F.3d 1315 (11th Cir. 1999) 9

United States v. Muhammad, 165 F.3d 327 (5th Cir. 1999) 14

United States v. Rivera-Sola, 713 F.2d 866 (1st Cir. 1983) 9

Page

CASES - (Cont'd)

United States v. Woodard, 387 F.3d 1329 (11th Cir. 2004) 13

United States v. Young, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, and n. 12, 84 L.Ed. 2d 1 (1985) 10

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed. 2d 700 (1982) 10

Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L.Ed. 2d 632 (1988) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, sec. 1 . . . i, iii, 2, 6-8, 12-15, 17-18

STATUTES AND RULES

18 U.S.C. § 3401(b) 10

28 U.S.C. § 636 12

28 U.S.C. § 636(b)(3) 2, 12-13, 16, 18

28 U.S.C. § 636(c) 14

28 U.S.C. § 1254(1) 1

Fed. R. Crim. P. 51 9

Fed. R. Crim. P. 52(b) 8, 10

Sup. Ct. R. 13.1 1

PRAYER

Petitioner, Homero Gonzalez, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case, which is reported at United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007), is attached to this petition as Appendix A. The judgment of the district court is attached as Appendix B. The district court did not issue any written opinion or order related to the issue raised in this petition.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 30, 2007. No petition for rehearing was filed. This petition is filed within ninety days after entry of judgment by the Court of Appeals. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented implicates Article III, section 1, and 28 U.S.C. § 636(b)(3), which provide that:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. Art. III, sec. 1; and

> A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

28 U.S.C. § 636(b)(3).

STATEMENT OF THE CASE[1]

A. Proceedings Below

On December 7, 2004, a federal grand jury in Laredo, Texas, returned a multi-count superseding indictment charging the petitioner, Homero Gonzalez, and a co-defendant, Patrick Leyendecker, with both conspiracy and substantive drug offenses involving large quantities of marijuana. R. 32. Mr. Gonzalez pleaded not guilty and the case proceeded to a jury trial on January 24, 2005. R. 59. On January 26, 2005, the jury returned a verdict of guilty on all counts. R. 76.

On April 27, 2005, the district court sentenced Mr. Gonzalez to serve 190 months in the custody of the Federal Bureau of Prisons to be followed by a five-year period of supervised release. R. 89. The court waived a fine but imposed a $500 special assessment. Id. On May 3, 2005, Mr. Gonzalez filed a timely notice of appeal. R. 99.

On March 30, 2007, the United States Court of Appeals for the Fifth Circuit affirmed Mr. Gonzalez's conviction. Appendix A. No petition for rehearing was filed.

---

[1] The record on appeal ("R.") is cited by the pagination appearing in the electronic record used by the Court of Appeals. The presentence report ("PSR") is cited by paragraph number.

B. Statement of the Facts

The facts of the offenses[2] are not relevant to sole legal issue raised on appeal. The only relevant facts concern the pretrial procedural events related to jury selection.

At the time of trial, Homero Gonzalez was a 45-year old Mexican citizen. See PSR ¶ 58. The record reflects that Mr. Gonzalez did not speak English and required the assistance of an official court interpreter (who interpreted the English proceedings into Spanish). R. 152. After Mr. Gonzalez was indicted, there were four pretrial conferences in this case, which occurred (in sequential order) on November 19, 2004; December 14, 2004; December 17, 2004; and January 18, 2005. See R. 276-84 (Pretrial Conference Transcript, November 19, 2004); R. 272-73 (Pretrial Conference Transcript, December 14, 2004); R. 227-33 (Pretrial Conference Transcript, December 17, 2004); R. 235-40 (Pretrial Conference Transcript, January 18, 2005). United States District Judge George P. Kazen presided over each of the four pretrial conferences.

At no point during any of the pretrial conferences did Mr. Gonzalez consent to have a United States magistrate judge preside over jury selection in his case. See id. The only mention of jury selection came at the very end of the last pretrial conference, when Judge Kazen stated that "we're picking a jury" the following Friday or Monday but made no reference to a magistrate judge assisting in jury selection. R. 240.

---

[2] See PSR ¶¶ 8-35 (discussing the prosecution's evidence of the offenses).

At the outset of the jury selection process, which occurred on Friday, January 21, 2005, United States Magistrate Judge Adriana Arce-Flores asked "the attorneys [to] approach the bench." R. 151. She then stated the following: "I need to ask the parties at this time if they are going to consent to having th[is] United States Magistrate Judge proceed in assisting in the jury selection of this case." Id. The prosecutor first responded, "Yes, we are, your Honor." Id. Mr. Gonzalez's attorney, Oscar Pena, Sr., then responded: "Yes, your Honor, we are." Id. Magistrate Judge Arce-Flores then stated, "The parties have agreed through consent that this Court will be assisting through the process of jury selection." Id. at 151-52. Magistrate Judge Arce-Flores then asked defense counsel "[i]s the defendant present," to which defense counsel responded, "[h]e is present, your Honor." R. 152. Magistrate Judge Arce-Flores next asked defense counsel whether Mr. Gonzalez "need[s] the assistance of a[] [Spanish] interpreter," to which defense counsel responded, "[y]es he does, your Honor." Id. At no point did the magistrate judge ask *Mr. Gonzalez* whether he had consented to the magistrate judge's presiding over jury selection or even mention the fact that his attorney had consented. (The relevant excerpt from the voir dire proceedings is attached as Appendix C.) Only defense counsel was asked to consent when he and the prosecutor approached the bench - outside of Mr. Gonzalez's presence and before he had the services of a Spanish interpreter. The record also does not contain any type of written consent executed by Mr. Gonzalez.

The jury trial commenced on the morning of Monday, January 24, 2005, before a visiting district judge, the Honorable Adrian Duplantier. See R. 59. On January 26, 2005, the jury convicted Mr. Gonzalez. R. 76.

For the first time on appeal, Mr. Gonzalez (represented by new counsel) contended that the magistrate judge's presiding over jury selection was improper because the record did not reflect Mr. Gonzalez's knowing and voluntary consent to such. See C.A. Brief of Appellant, at 6-11. The Fifth Circuit rejected this claim and held that the fact that defense counsel had consented to the magistrate judge's presiding over jury selection was legally sufficient even though the record did not reflect Mr. Gonzalez's own personal, knowing consent:

> Gonzalez relies heavily on the Eleventh Circuit decision in United States v. Maragh, 174 F.3d 1202 (11th Cir.1999), which presented a factual scenario similar to this case. . . . The Eleventh Circuit appears to be alone in having reached the conclusion that the defendant's personal consent is required for the delegation of jury selection to be constitutionally valid. Given the unsettled state of the law, . . . it is difficult to see how Gonzalez could demonstrate that the delegation of jury selection [without his personal consent] constituted a plain error. Even if, however, we were to review under a less stringent standard, [Gonzalez is not entitled to relief]. No court other than the Maragh panel of the Eleventh Circuit has reached the outcome Gonzalez proposes, and the debate among the other circuits appears to turn on whether affirmative consent is required at all, not on what form this consent must take.
>
> Although certain rights are so fundamental that they must be waived personally by the defendant, Gonzalez provides no support for his contention that the right to have an Article III judge conduct voir dire is among them. What suffices for waiver depends on the nature of the right at issue. [W]hether the defendant must participate personally in the waiver; whether certain

> procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. [Citations and internal quotation marks omitted.] As the Government points out, the defendant does not, by waiving his right to have an Article III judge conduct voir dire, waive his right to judicial review of those proceedings. [Citations omitted.] The nature of the right given up is therefore limited, particularly as compared to the other rights that we have held may be waived via counsel. In sum, there is no error here; the right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel.

Gonzalez, 483 F.3d at 393-94.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and resolve the division among several circuit courts concerning whether a federal criminal defendant must personally consent to a United States magistrate judge's presiding over jury selection or whether consent from the defendant's counsel by itself is sufficient to satisfy Article III's requirements.

For the reasons discussed below, petitioner's case presents an excellent vehicle for this Court to decide an important, recurring statutory and constitutional issue in federal criminal practice with wider implications for myriad federal cases, criminal and civil alike. The Fifth Circuit's decision in petitioner's case not only directly conflicts with decisions of at least one other United States Court of Appeals but also is in tension with decisions of this Court. Certiorari should be granted.

I. Threshold Issue: Does the Plain Error Standard Apply?

A threshold issue in this case, which also has divided the circuit courts, is whether the plain error standard of Federal Rule of Criminal Procedure 52(b) applies. Petitioner did not object to the magistrate judge's presiding over jury selection in the district court. The Fifth Circuit concluded that, because petitioner for the first time on appeal raised the issue of whether his personal consent was required for a valid delegation of jury selection to the magistrate judge, the claim was subject to the plain error standard. See Gonzalez, 483 F.3d at 394. According to the Fifth Circuit, "[t]his appears to be the practice in the other circuits that have considered this type of claim." Id. (citing

decisions of the First, Seventh, and Eleventh Circuits). Although the cited decisions of the First and Seventh Circuit so hold,[3] the Eleventh Circuit decision cited by the Fifth Circuit in fact explicitly held that the plain error standard is *not* applicable to this type of claim raised for the first time on appeal. See United States v. Maragh, 189 F.3d 1315, 1316-17 (11th Cir. 1999) (supplemental opinion on rehearing).[4] In support of its position, the Eleventh Circuit cited with approval both this Court's majority opinion (which never invoked the plain error standard notwithstanding a lack of objection in the district court in that case) and Justice Scalia's dissenting opinion in Peretz v. United States, 501 U.S. 923 (1991). See Maragh, 189 F.3d at 1316-17.[5]

---

[3] See United States v. Jones, 938 F.2d 737, 744 (7th Cir. 1991); United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983).

[4] In both his reply brief and at oral argument in front of the Fifth Circuit, petitioner cited the Eleventh Circuit's opinion on rehearing in Maragh for the proposition that the plain error standard was inapplicable in petitioner's case. See C.A. Reply Brief for Appellant, at 4 n.2. He alternatively contended that he was entitled to relief even under the plain error standard. See id. at 4.

[5] As Justice Scalia stated:

> As a general matter, of course, a litigant must raise all issues and objections at trial. . . . For criminal proceedings in the federal courts, this principle is embodied in Federal Rule of Criminal Procedure 51, which requires "a party, at the time the ruling or order of the [trial] court is made or sought, [to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor." Rule 51's command is not, however, absolute. . . . [P]etitioner plainly forfeited the right to advance his current challenges to the Magistrate's role. In certain narrow contexts, however,

appellate courts have discretion to overlook a trial forfeiture. The most important of these is described in Federal Rule of Criminal Procedure 52(b): In criminal cases, an appellate court may notice "errors or defects" not brought to the attention of the trial court if they are "plain" and "affec[t] substantial rights." See United States v. Young, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, 1046, and n. 12, 84 L.Ed.2d 1 (1985). . . .

Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 535-536, 82 S.Ct. 1459, 1464-1465, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.); Grosso v. United States, 390 U.S. 62, 71-72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); Hormel v. Helvering, 312 U.S. 552, 556-560, 61 S.Ct. 719, 721-723, 85 L.Ed. 1037 (1941). In my view, that course is appropriate here. Petitioner's principal claims are that the Federal Magistrates Act does not allow a district court to assign felony voir dire to a magistrate even with the defendant's consent, and that in any event the consent here was ineffective because given orally by counsel and not in writing by the defendant. By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them, with the defendant's consent, to refer felony voir dire to a magistrate, and, if so, what form the consent must take. Cf. 18 U.S.C. § 3401(b) (defendant's consent to magistrate in misdemeanor trial must be in writing).

Given the impediments to the proper assertion of these claims, I believe we are justified in reaching the statutory issue today to guide the district courts in the future performance of their duties. It is not that we must address the claims because all legal questions require judicial answers, cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982); Webster v. Doe, 486 U.S. 592, 612-613, 108 S.Ct. 2047, 2058-2059, 100 L.Ed.2d 632 (1988) (SCALIA, J., dissenting), but simply that the relevant rules and statutes governing forfeiture, as we have long construed them, recognize a limited discretion which it

Justice Scalia's dissenting opinion - which agreed with the majority's decision to reach the merits of the issue despite the lack of objection in the district court - contended that the plain error standard is inapplicable when a litigant's claim "can be advanced *only* by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would *never* know whether the [Federal Magistrates] Act authorizes them, with the defendant's consent, to refer felony voir dire to a magistrate and, if so, what form the consent must take." Peretz, 501 U.S. at 954-55 (Scalia, J., dissenting).

In petitioner's case, the very nature of his claim - *i.e.*, that a defendant must *personally* consent in a knowing and voluntary manner to delegation of jury selection to a magistrate judge and that defense counsel's consent is not by itself sufficient - presupposes no objection in the district court. For that reason, this Court should refuse to apply the plain error standard and exercise this Court's discretion to address the merits of petitioner's claim (which the Fifth Circuit did in the alternative, see Gonzalez, 483 F.3d at 394).

---

is eminently sensible to exercise here.

Peretz, 501 U.S. at 953-55 (Scalia, J., dissenting).

II. A Federal Criminal Defendant's *Personal* Consent to Delegation of Voir Dire to a Magistrate Judge Is Required Under Article III and 28 U.S.C. § 636(b)(3).

In 1991, in Peretz, this Court held that, *with a federal criminal defendant's consent*, a district court does not violate the defendant's constitutional right to an Article III judge or the Federal Magistrates Act, 28 U.S.C.§ 636,[6] then it delegated jury selection to a magistrate judge. Peretz, 501 U.S. at 933-36. Previously, in Gomez v. United States, 490 U.S. 858 (1989), this Court had interpreted § 636(b)(3) to require a defendant's consent to delegation of jury selection in a federal felony case to a magistrate judge; this Court interpreted the statute in this manner to avoid the serious constitutional question that would arise if a non-Article III judge were to preside over such a critical stage of trial without the defendant's consent. See id. at 864.

As the Fifth Circuit recognized in petitioner's case, since Peretz, the federal circuit courts have issued conflicting decisions about whether consent from a defendant to delegation of jury selection to a magistrate judge must be *personally* given by the defendant himself in order to be valid or, instead, whether defense counsel's consent by itself is sufficient (without an

---

[6] 28 U.S.C. § 636, the Federal Magistrates Act, governs the types of proceedings in federal civil and criminal cases over which a United States magistrate judge can preside. In addition to the many specific duties that the statute permits a district court to delegate to a magistrate judge (with jury selection in a federal felony criminal case *not* included among them), § 636(b)(3) provides that: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. 28 U.S.C. § 636(b)(3).

indication in the record that the defendant explicitly agreed or at least knowingly and voluntarily acquiesced in counsel's consent). See Gonzalez, 483 F.3d at 393-94 (citing decisions of the First, Seventh, and Eleventh Circuits). As the Fifth Circuit noted, the Eleventh Circuit has required "the defendant's personal consent,"[7] while the First Circuit has held that a lack of objection from the defendant constitutes a "waiver" of a defendant's right to have an Article III judge preside over jury selection.[8] The Seventh Circuit has held that it is not "plain error" for a magistrate judge to preside over jury selection in a federal felony case when the defendant does not object and, thus, has not held that a defendant's personal consent is required even in the absence of a contemporaneous objection from a defendant or defense counsel.[9]

The Fifth Circuit held that a federal defendant's attorney is authorized to consent on behalf of a defendant (whether the

---

[7] See United States v. Maragh, 174 F.3d 1202 (11th Cir.), supplemental op. on reh'g, 189 F.3d 1315 (11th Cir. 1999); see also United States v. Woodard, 387 F.3d 1329, 1332 (11th Cir. 2004) (reaffirming Maragh).

[8] United States v. Desir, 273 F.3d 39, 44 (1st Cir. 2001). In a civil case, the Eighth Circuit issued a decision directly in conflict with the First Circuit's decision in Desir. See Harris v. Folk Construction Company, 138 F.3d 365, 368-71 (8th Cir. 1998) (rejecting appellee's "waiver" argument and stating that "we conclude that, absent clear and unambiguous consent of the affected parties, a district court may not delegate, pursuant to § 636(b)(3), [jury selection]" to a magistrate judge). Notably, both the First and Eighth Circuit cited this Court's decision in Peretz in support of their respective positions. See Desir, 273 F.3d at 44 (citing Peretz); Harris, 138 F.3d at 369-370 & n.8 (citing Peretz).

[9] United States v. Jones, 938 F.2d 737, 744 (7th Cir. 1991).

defendant is even aware of counsel's actions) and that the record need not reflect the defendant's "personal" consent. Gonzalez, 483 F.3d at 394.[10] The Fifth Circuit specifically declined to adopt the position of the Eleventh Circuit in Maragh. See id.

While not directly addressing the issue of whether counsel may waive a litigant's right to an Article III judge, the Sixth and Tenth Circuits have held that a litigant's waiver of that right must be "voluntary, knowing, and intelligent." Norris v. Schotten, 146 F.3d 314, 326 (6th Cir. 1998) (citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); United States v. Dobey, 751 F.2d 1140, 1141-43 (10th Cir. 1985). Certainly, it would appear that, under this precedent, a represented litigant at least must be *aware* of his attorney's consent. The record in the instant case, as discussed above, does not reflect Mr. Gonzalez's knowledge of his attorney's consent.

Since the time that the Fifth Circuit issued its decision in petitioner's case, the Ninth Circuit, in a two-to-one decision, addressed a closely related question and held that a defendant's personal consent is not required for a magistrate judge to preside over closing arguments and that defense counsel's consent by itself is sufficient under Peretz and Gomez. See United States v. Gamba, ___ F.3d ___, 2007 WL 1063147 (9th Cir. Apr. 11, 2007), reh'g en

---

[10] Accord United States v. Muhammad, 165 F.3d 327, 331-33 (5th Cir. 1999) (holding that a civil litigant's attorney is authorized to consent to a magistrate judge to enter judgment in a civil case pursuant to 28 U.S.C. § 636(c), and that the civil defendant himself need not "personally" consent).

banc denied, No. 06-35021 (9th Cir. May 22, 2007); see also id. at *8 (Fisher, J., dissenting) (contending that a federal criminal defendant's personal consent is required) (citing the Eleventh Circuit's decision in Maragh).[11]

The Eleventh Circuit in Maragh and the dissenting judge in Gamba were correct. For that reason, the Fifth Circuit erred in affirming Mr. Gonzalez's conviction, as the record does not reflect Mr. Gonzalez's knowing and voluntary *personal* consent to have a non-Article III judge preside over jury selection. As Ninth Circuit Judge Fisher recently explained:

> . . . [L]ike the Eleventh Circuit in Maragh, I read the Supreme Court as requiring some evidence that the defendant has personally and knowingly agreed to the substitution of a magistrate judge for an Article III judge [during a critical stage] - evidence that is lacking here.
>
> Peretz made clear that "the litigants' consent makes the crucial difference" when "construe[ing] the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates." Peretz, 501 U.S. at 933, 111 S.Ct. 2661. In doing so, the Court noted that the defendant's due process right to have an Article III judge preside over the critical stages of his felony trial is an underlying concern when interpreting the "additional duties"

---

[11] The Ninth Circuit's decision in Gamba appears to conflict with the Ninth Circuit's earlier decisions in United States v. Gomez-Lepe, 207 F.3d 623, 631 (9th Cir. 2000) ("[W]e hold . . . that the magistrate judge should not have proceeded without the defendant's affirmative consent. . . . Nothing in the record indicates, nor does the government maintain, that Gomez-Lepe consented to the magistrate judge's actions. . . . [B]ecause Gomez-Lepe did not affirmatively consent, we conclude that the magistrate judge exceeded his authority."), and United States v. Foster, 57 F.3d 727, 731 & n.1 (9th Cir. 1995) (citing NLRB v. A-Plus Roofing, 39 F.3d 1410 (9th Cir. 1994), reh'g en banc on other grounds, 133 F.3d 704 (9th Cir. 1998), vacated on other grounds, 525 U.S. 801 (1998), on remand, 165 F.3d 689 (9th Cir. 1999).

provision of the [Federal Magistrates Act]. See id. at 932-33, 111 S.Ct. 2661. Congress specifically limited assignments to "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3) In interpreting the FMA, therefore, it is "settled policy to avoid an interpretation . . . that engenders constitutional issues." Peretz, 501 U.S. at 929, 111 S.Ct. 2661 (quoting Gomez, 490 U.S. at 864, 109 S.Ct. 2237). This framework controls our assessment of whether the "crucial" element of defendant's consent to the magistrate judge's jurisdiction has been established.

Whatever ambiguity may exist in Peretz, the Supreme Court has never endorsed the legitimizing force of consent to a magistrate judge's jurisdiction on a record so devoid of any indication that the defendant himself understood and knowingly waived his right to have a "person with jurisdiction to preside" over all critical stages of his felony trial. Gomez, 490 U.S. at 876, 109 S.Ct. 2237. In Peretz, the Court noted that "*both* petitioner and his counsel" attended the pre-trial conference at which the counsel consented to the magistrate judge's jurisdiction and that the magistrate judge thereafter specifically asked counsel whether she had the "*clients'* consent to proceed with the jury selection." 501 U.S. at 925, 111 S.Ct. 2661 (emphasis added). The Court did not specify whether the petitioner's presence and failure to object were necessary components of his consent, but the Eleventh Circuit has understood them as such. See Maragh, 174 F.3d at 1206. Maragh noted that "[i]n Peretz, the specific consent that the Supreme Court approved consisted of (a) trial counsel's agreement to the procedure, (b) trial counsel's representation that the client was aware of and agreed to the procedure, and (c) the lack of any objection from the defendant in the district court." Id. Maragh is buttressed by Peretz's suggestion that the defendant, not just his attorney, must agree to a magistrate judge: "'If a *criminal defendant, together with his attorney,* believes that the presence of a judge best serves his interests during the selection of the jury, then Gomez preserves his right to object to the use of a magistrate.'" Peretz, 501 U.S. at 935, 111 S.Ct. 2661 (quoting Government of the Virgin Islands v. Williams, 892 F.2d 305, 311 (3d Cir.1989)) (emphasis added). Here, neither the district judge nor magistrate judge asked for or received consent in the presence of the defendant. . . .

Gamba, 2007 WL 1063147, at *8-*10 (Fisher, J., dissenting) (emphasis in original).

Besides the foregoing language in Peretz and Gomez cited by Judge Fisher, this Court's decision in Commodities Future Trading Comm'n v. Schor, 478 U.S. 833 (1986), strongly suggests a litigant's consent to have a non-Article III judge preside over a critical stage of his trial must be "personal." In Schor, this Court described the constitutional right to an Article III judge as "a personal right." Id. at 848. How, one may fairly ask, can a litigant's attorney waive a litigant's "personal" constitutional right when the litigant is not even aware of the attorney's waiver?

Although this Court has stated that a criminal defendant need not "personally make an informed waiver" of most rights related to the conduct of a trial (*e.g.*, evidentiary objections) and that an attorney may waive such rights without the defendant's knowledge or participation in the waiver, New York v. Hill, 528 U.S. 110, 114-15 (2000), "[f]or certain fundamental rights, the defendant must ***personally*** make an informed waiver." Id. at 114 (emphasis added)(citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) (right to counsel); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (right to plead not guilty)). One of those fundamental rights is the right to a jury trial. Patton v. United States, 281 U.S. 276, 312 (1930), overruled on other grounds, Williams v. Florida, 399 U.S. 78, 90 (1970). The waiver of such a fundamental right must constitute "the express and intelligent consent of the defendant [to proceed without a jury]." Patton, 281 U.S. at 312;

accord United States v. Frechette, 456 U.S. 1, 9 (1st Cir. 2006). Similarly, there must be "express and intelligent consent" from a criminal defendant himself for a non-Article III judge to preside over a critical stage of trial.

Notably, in discussing the waiver of the constitutional right to an Article III judge, this Court has spoken of the right in a manner that equates it to the most "fundamental" rights of a criminal defendant. See Schor, 478 U.S. at 848 ("Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried. See, e.g., Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (waiver of criminal trial by guilty plea); Duncan v. Louisiana, 391 U.S. 145, 158, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968) (waiver of right to trial by jury in criminal case).").[12]

In conclusion, "[g]iven the unsettled state of the [case] law interpreting Peretz," Gonzalez, 483 F.3d at 394, this Court should grant certiorari and address this important issue. The specific issue raised by petitioner's case (which concerns a federal criminal defendant's consent to a magistrate judge's presiding over jury selection) has broader implications for all federal criminal cases, civil and criminal alike, insofar as 28 U.S.C. § 636(b)(3)

---

[12] See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (describing Article III's creation of an independent judiciary as a "fundamental principle").

applies to many potential contexts. See, e.g., Gamba, 2007 WL 1063147 (addressing the consent issue in the context of a magistrate judge's presiding over closing arguments in a federal criminal case); Harris, 138 F.3d at 371 (addressing the consent issue in the context of a magistrate's presiding over jury selection in a federal civil case). For all these reasons, certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner, Homero Gonzalez, prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date:
May 24, 2007

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By_____
BRENT E. NEWTON
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 310
Houston, TX 77002-1634
Telephone: (713) 718-4600

No. 06-11612

IN THE SUPREME COURT OF THE UNITED STATES

HOMERO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

VIJAY SHANKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is entitled to a new trial because the district court delegated voir dire to a magistrate judge with the consent of defense counsel but without petitioner's express personal consent.

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-11612

HOMERO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DECISION BELOW

The decision of the court of appeals (Pet. App. A at 21-25) is published at 483 F.3d 390.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2007. The petition for a writ of certiorari was filed on May 24, 2007. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to possess more than 1,000 kilograms of

marijuana with intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A) and 846, and four counts of aiding and abetting the possession of more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A at 21-25.

1. Petitioner was a high-level member of a narcotics trafficking organization based in Laredo, Texas, that was responsible for the transportation of thousands of kilograms of marijuana from Mexico to various destinations in the United States. Drugs from Mexico were delivered to warehouses in Laredo, where they were loaded onto trailers with commercial products for transportation to points north. Petitioner and others were responsible for preparing one warehouse to receive the marijuana loads and arranging for the marijuana to be loaded onto trailers and transported out. Petitioner helped to traffic more than 2,600 kilograms of marijuana. Presentence Report ¶¶ 8-35.

2. A federal grand jury in the United States District Court for the Southern District of Texas charged petitioner with conspiracy and aiding and abetting offenses. His initial appearance, detention hearing, and arraignment took place before United States Magistrate Judge Adriana Arce-Flores. Petitioner pleaded not guilty and elected to be tried by a jury. United

States District Court Judge George P. Kazen handled four pretrial conferences. Gov't C.A. Br. 3; Pet. App. A22.

On January 21, 2005, petitioner and his counsel appeared before Magistrate Judge Arce-Flores for jury selection. At the beginning of the process, the magistrate judge asked both parties "if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." Pet. App. C at 36. Counsel for the government responded: "Yes, we are, your Honor." Ibid. Petitioner's counsel also responded: "Yes, your Honor, we are." Ibid. The magistrate judge then stated: "The parties have agreed through consent that this Court will be assisting through the process of jury selection." Id. at 36-37. The magistrate judge did not ask petitioner directly whether he consented to having a magistrate judge perform jury selection, and petitioner did not execute a written consent. Pet. App. A at 22; Pet. App. C at 37.

Petitioner was present during that exchange, and the magistrate judge asked whether petitioner required the assistance of a translator. Petitioner's counsel responded: "Yes he does, your Honor." Pet. App. C at 37. The magistrate judge then introduced herself: "I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process." Ibid.

Voir dire proceeded without incident or objection by

petitioner. The magistrate judge provided the parties and venire members with a detailed explanation of the jury selection process. She permitted the parties to make statements to the venire members and to frame and ask their own series of questions. The magistrate judge also questioned venire members personally. All prospective jurors excused for cause were excused either at defense counsel's request or without objection by defense counsel. Gov't C.A. Br. 7-8; Pet. App. A at 22.

3. United States District Court Judge Adrian G. Duplantier presided over petitioner's trial. The jury found petitioner guilty of all counts. He received a sentence of 190 months of imprisonment, to be followed by five years of supervised release.

4. The court of appeals affirmed, rejecting petitioner's claim that the district court erred in delegating voir dire to a magistrate judge without petitioner's express personal consent. Pet. App. A at 21-25. Because petitioner had failed to object to the delegation before the district court, the court of appeals reviewed for plain error. Id. at 22. The court noted, however, that it found petitioner's argument unpersuasive even "under a less stringent standard." Id. at 24.

The court of appeals held that the right to have an Article III judge conduct voir dire may be waived through counsel. Pet. App. A at 25. It noted that, under this Court's decision in Peretz v. United States, 501 U.S. 923, 940 (1991), jury selection may be

delegated to a magistrate judge in the absence of an objection by the defendant. Pet. App. A at 22-23. The court found that "[t]he fact pattern in Peretz, in which the delegation was found to be permissible, is almost identical to that in the instant case," and that Peretz contains "no indication" that this Court found "the absence of specific consent by the defendant to be a dispositive, or even relevant consideration." Id. at 24.

The court acknowledged that one court had reached the opposite conclusion, see United States v. Maragh, 174 F.3d 1202 (11th Cir.), modified and pet. for reh'g denied, 189 F.3d 1315 (11th Cir. 1999) (per curiam), and found the decisions of other courts of appeals inapposite because their debate "appears to turn on whether affirmative consent is required at all, not on what form this consent must take." Pet. App. A at 24. The court declined to follow Maragh, noting that "[w]hat suffices for a waiver depends on the nature of the right at issue," ibid. (quoting New York v. Hill, 528 U.S. 110, 114 (2000)), and that the right to have an Article III judge conduct voir dire is even more "limited" in nature than other rights that can be waived by counsel, id. at 24-25. Having determined that the right to have an Article III judge preside at voir dire is not so fundamental that it must be waived personally, the court of appeals found no error and affirmed the judgment of the district court. Id. at 25.

ARGUMENT

Petitioner contends (Pet. 8-19) that he is entitled to a new trial because the district court delegated voir dire to a magistrate judge without his express personal consent. That claim lacks merit and does not warrant further review.

1. The Federal Magistrates Act, 28 U.S.C. 636, permits district courts to assign magistrate judges certain described powers and duties, as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3); see Gomez v. United States, 490 U.S. 858, 860 (1989). In Gomez, this Court held that those "additional duties" do not encompass the selection of a jury in a felony trial over the defendant's objection. Id. at 872. Two years later, in Peretz v. United States, 501 U.S. 923 (1991), the Court considered whether the Act permits a magistrate judge to supervise voir dire with the consent of the parties. Id. at 933.

In Peretz, the district court judge asked at a pretrial conference whether there was "[a]ny objection to picking the jury before a magistrate." 501 U.S. at 925. The defendant's counsel responded: "I would love the opportunity." Ibid. Before jury selection began, the magistrate again requested "assurances from counsel for [the defendant] and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection." Ibid. Counsel for the defendant responded: "Yes, your

Honor." Id. at 925 n.2. The defendant was present for both exchanges, but never personally consented to the delegation. See id. at 925; United States v. Gamba, 483 F.3d 942, 948-949 (9th Cir. 2007) ("[T]here is no express indication in Peretz that the defendant ever personally consented to the magistrate's presence.").

The Court held that "supervision of voir dire in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent." Peretz, 501 U.S. at 935. It declined to reach the question whether Article III provides criminal defendants a constitutional right to demand the presence of an Article III judge at voir dire, determining instead that "a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence." Id. at 936. The Court noted that the failure to raise a timely objection may result in the loss of a host of personal constitutional rights, including the right to be present at all stages of a criminal trial, see United States v. Gagnon, 470 U.S. 522, 528 (1985), the right to an open courtroom, see Levine v. United States, 362 U.S. 610, 619 (1960), and the Fourth Amendment right to be free from unreasonable searches and seizures, Segurola v. United States, 275 U.S. 106, 111 (1927). Peretz, 501 U.S. at 936; see Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more

familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right."). The Court also held that, because the ultimate decision whether to empanel the jury remains in the hands of the district court judge, the right to have an Article III judge preside over jury selection does not fall within any category of "structural protections" that litigants cannot waive. Id. at 937-939.

Nothing in Peretz suggests that a defendant must state his express personal consent to a magistrate judge's supervision of voir dire, and the Court's opinion indicates that defense counsel's consent on his client's behalf is sufficient. The Court found it "critical[]" in distinguishing Gomez that the "[defendant's] counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it." Peretz, 501 U.S. at 932 (emphasis added). The Court also expressed "confiden[ce] * * * that defense counsel can sensibly balance [the relevant] considerations in deciding whether to object to a magistrate's supervision of voir dire." Id. at 935 n.12 (emphasis added). As the court of appeals recognized, "there is no indication [in Peretz] that the Court found the absence of specific consent by the defendant to be a dispositive, or even relevant consideration." Pet. App. 24 at C; see Gamba, 483 F.3d at 949 ("We do not know * * * whether the Peretz court 'contemplated' that defendant's consent must be

personal, but it by no means required it.").

Based on Peretz, four courts of appeals have held that a defendant need not give any form of affirmative consent to the supervision of voir dire by a magistrate judge. See United States v. Desir, 273 F.3d 39, 44 (1st Cir. 2001) (holding that "affirmative consent is not required" and that "a magistrate may conduct jury selection unless the defendant or his attorney registers an objection");[1] Clark v. Poulton, 963 F.2d 1361, 1366 n.5 (10th Cir.) ("Peretz permits referral to the magistrate of felony trial jury voir dire where the parties consent or where the defendant raises no objection."), cert. denied, 506 U.S. 1014 (1992);[2] United States v. Arnoldt, 947 F.2d 1120, 1123 (4th Cir. 1991) (under Peretz, the failure to object to the delegation of authority to the magistrate waives any resulting constitutional error), cert. denied, 503 U.S. 983 (1992); United States v. Jones,

---

[1] See also United States v. Nickens, 955 F.2d 112, 116 n.1 (1st Cir.), cert. denied, 506 U.S. 835 (1992); United States v. Martinez-Torres, 944 F.2d 51, 52 (1st Cir. 1991) (en banc) ("[I]nsofar as the appellants urge that a magistrate might only empanel in a felony case upon the defendant's specific, written consent, it is dispositive to note that in Peretz itself no such written consent existed.").

[2] Petitioner suggests, based on a pre-Peretz decision, that the Tenth Circuit would require a "voluntary, knowing, and intelligent" waiver of the right to have an Article III judge supervise voir dire. Pet. 14 (citing United States v. Dobey, 751 F.2d 1140, 1141-1143 (10th Cir. 1985)). The court in Dobey made no such holding, and its subsequent decision in Clark makes clear that the Tenth Circuit considers the delegation of voir dire to a magistrate judge proper under Peretz in the absence of an objection by the defendant. See Clark, 963 F.2d at 1366 n.5.

938 F.2d 737, 744 (7th Cir. 1991) (holding that "our outcome is the same" whether the defendant "simply did not object or in fact consented to this procedure").

Two other courts of appeals have required affirmative consent to a delegation of voir dire to a magistrate judge, but also have indicated that a statement by counsel is sufficient. The Eighth Circuit, in a civil case, Harris v. Folk Construction Co., 138 F.3d 365 (1998), reiterated its "consistent[]" holding that "[s]ection 636(c) requires a clear and unambiguous statement in the record of the affected parties' consent." Id. at 369 (internal quotation marks omitted). It acknowledged, however, that the statements of counsel at issue in Peretz can serve as a sufficiently "clear and unambiguous statement." Id. at 369 (distinguishing Peretz on the ground that in "the instant [case] * * * there was no discernible statement of consent by the litigants"); see also Reiter v. Honeywell, Inc., 104 F.3d 1071, 1073 (8th Cir. 1997) ("In Peretz v. United States, the parties expressly consented to the magistrate judge's conducting of the voir dire."). Similarly, the Ninth Circuit has held, in other contexts, that "'consent by failure to object' is insufficient to clothe the magistrate with § 636(c) powers," United States v. Gomez-Lepe, 207 F.3d 623, 631 (2000) (quoting Nasca v. Peoplesoft, 160 F.3d 578, 579 (9th Cir. 1998)), but it has concluded that a statement of consent by counsel is sufficient under the reasoning of Peretz, see Gamba, 483 F.3d at

948.

Only one court of appeals has reached a result contrary to the decision of the court of appeals in this case. In United States v. Maragh, 174 F.3d 1202 (11th Cir. 1999) (Maragh I), supp. on panel reh'g, 189 F.3d 1315 (11th Cir. 1999) (per curiam) (Maragh II), the Eleventh Circuit held that, "[t]o effectuate appropriate consent when a magistrate judge is delegated the district court's authority to conduct voir dire, the magistrate judge or the district court judge must obtain, on the record, explicit and personal consent from all parties involved, particularly from the defendant." Id. at 1206. The court made clear that the consent of counsel, on behalf of his client, is not enough: "the record must reflect the consent of the defendant herself." Maragh II, 189 F.3d at 1318. The court distinguished Peretz on the ground that, in that case, defense counsel had stated that the court had the consent of his client. Maragh I, 174 F.3d at 1206 (citing Peretz, at 501 U.S. at 925 n.2); Maragh II, 189 F.3d at 1316 (in Peretz, "the record clearly reflected that the defendant, not just counsel, consented to the conduct of the voir dire by the magistrate judge").

Both the court of appeals in this case and the Ninth Circuit in Gamba have correctly rejected the reasoning of Maragh. Because the decision whether to empanel the jury selected under a magistrate judge's supervision "remains entirely with the district court," Peretz, 501 U.S. at 937, and consent to the delegation in

no way surrenders a right to judicial review of the proceedings, Pet. App. C at 23-24, the right to have an Article III judge supervise voir dire does not fall within the narrow category of rights "so fundamental that they must be waived personally by the defendant." Id. at 24 (citing New York v. Hill, 528 U.S. 110, 114 (2000)). Even assuming, as petitioner argues (Pet. 17), that the Constitution protects a personal right to voir dire proceedings conducted by an Article III judge, it is well-established that counsel may make a tactical decision to waive equally fundamental personal rights on behalf of a defendant, even when the waiver invites serious consequences. See Gamba, 483 F.3d at 948 ("[I]t cannot reasonably be said that such a 'right' -- if there is one at all -- rises to the level of such basic and fundamental rights as deciding whether to plead guilty or appeal one's conviction."). This Court's reliance in Peretz on rights that can be waived through a failure to object, with no affirmative statement of consent, 501 U.S. at 936, substantially undermines the Maragh court's conclusion that the delegation of supervisory authority over voir dire requires an express statement of consent on the record by the defendant himself.

Further, the Maragh court's effort to distinguish Peretz is unpersuasive. There is no meaningful difference between an attorney's statement of consent on behalf of his client -- in this case, a statement by petitioner's counsel that "we are" going to

consent, Pet. App. C at 36 -- and an attorney's statement that his client consents. See Gamba, 483 F.3d at 948-949 (rejecting an attempt to distinguish Peretz because "there is no express indication in Peretz that the defendant ever personally consented to the magistrate's presence, or that the Court requires that such consent * * * be personally given").

The narrow conflict over the question whether defense counsel's consent, rather than the defendant's personal consent, is sufficient under Peretz does not warrant review by this Court at this time. Only two courts of appeals, the Fifth Circuit in this case and the Eleventh Circuit in Maragh, have considered that precise issue, and the parties did not seek rehearing en banc in either of those cases. Because the Eleventh Circuit may yet harmonize its decisions with the prevailing view that a defendant may consent to supervision of voir dire by a magistrate through either a failure to object or a statement of consent by counsel, review by this Court would be premature.

2. Even if the conflict otherwise warranted this Court's review, this case would be a poor vehicle for that review because petitioner failed to make any objection to the delegation before the district court. Accordingly, his claim would be reviewed only for plain error, and he would not be entitled to relief because he has made no claim of prejudice.

Petitioner acknowledges (Pet. 8) that he raised no objection

before the district court, either before or after jury selection, to the delegation of voir dire to the magistrate judge. Indeed, neither petitioner nor his counsel raised any objection even when directly asked "if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." Pet. App. C at 36. It was not until after his conviction that petitioner reversed course and complained that the magistrate's role in jury selection was such a fundamental error that, in spite of his acquiescence in the procedure, his conviction was void and he was entitled to a new trial. Applying ordinary principles of forfeiture, this Court would review for plain error and reverse only if it found "an 'error' that is 'plain' and that 'affect[s] substantial rights,'" and if it determined, in its discretion, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732 (1993) (quoting Fed. R. Crim. P. 52(b)). Because petitioner makes no claim that Magistrate Judge Arce-Flores's supervision of jury selection prejudiced the result of his trial or otherwise affected his substantial rights, he is not entitled to reversal.

Petitioner argues (Pet. 8-11) that this Court should review his claim de novo because it is of a type that can be advanced only by a litigant who, under ordinary rules, will be deemed to have forfeited it. Relying on Justice Scalia's solo dissent in Peretz,

petitioner concedes that he has "plainly forfeited the right to advance his current challenges to the Magistrate's role," 501 U.S. at 954-955, but asks this Court to exercise its discretion to entertain his challenge.[3] See Maragh II, 189 F.3d at 1316-1317. Petitioner acknowledges (Pet. 9) that courts of appeals overwhelmingly have reviewed claims identical to petitioner's for plain error. See Pet. App. A at 22; Maragh I, 174 F.3d at 1204; Jones, 938 F.2d at 744; United States v. Wey, 895 F.2d 429, 430 (7th Cir. 1990) (Easterbrook, J.), cert. denied, 497 U.S. 1029 (1990); United States v. Mang Sun Wong, 884 F.2d 1537, 1544-1546 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990); United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983).

Assuming, arguendo, that this Court in its discretion may review petitioner's claim de novo, however, such review would be inappropriate here. Petitioner's counsel, in petitioner's presence, expressly agreed to have the magistrate preside over jury selection. Pet. App. C at 36. That decision can be readily understood as a tactical judgment: counsel may have believed that the magistrate judge would conduct a more thorough voir dire because she had fewer distractions, that the magistrate judge would permit counsel to play a greater role in voir dire proceedings, or

---

[3] The majority in Peretz had no need to determine the applicable standard of review because it held that there is no error at all where a magistrate judge supervises voir dire with the consent of the parties. See id. at 954 & n.* (Scalia, J., dissenting).

that the magistrate judge would be more willing than the district judge to grant for-cause challenges to prospective jurors. To relieve counsel of the obligation to object allows the defendant to have the best of both worlds: the procedure the defendant prefers at the trial level, and a potentially winning argument on appeal if the case turns out badly. Plenary review in this case, where there has been no suggestion that the alleged error resulted in prejudice to petitioner, is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

VIJAY SHANKER
Attorney

AUGUST 2007

NO. 06-11612

IN THE SUPREME COURT OF THE UNITED STATES

HOMERO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

BRENT E. NEWTON
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 310
Houston, Texas 77002-1634
Telephone: (713) 718-4600

TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations ii

Reply to Brief for the United States in Opposition 1

I. The United States Makes Two Significant Factual Representations In Its Brief That Have No Support In The Record. 1

II. The Legal Issue In Petitioner's Case Is Worthy Of This Court's Review. 3

CONCLUSION 11

TABLE OF CITATIONS

Page

CASES

Boykin v. Alabama, 395 U.S. 238,
89 S. Ct. 1709, 23 L.Ed.2d 274 (1969) 7

Brookhart v. Janis, 384 U.S. 1 (1966) 6

Commodities Future Trading Comm'n v. Schor,
478 U.S. 833 (1986) 6-7

Cross v. United States, 325 F.2d 629
(D.C. Cir. 1963) 8

Duncan v. Louisiana, 391 U.S. 145
88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 7

Glidden Co. v. Zdanok, 370 U.S. 530,
82 S. Ct. 1459, 8 L.Ed.2d 671 (1962) 9

Grosso v. United States, 390 U.S. 62,
88 S. Ct. 709, 19 L.Ed.2d 906 (1968) 9

Hormel v. Helvering, 312 U.S. 552,
61 S. Ct. 719, 85 L.Ed. 1037 (1941) 9

Johnson v. Zerbst, 304 U.S. 458 (1938) 4, 6

Levine v. United States, 362 U.S. 610 (1960) 8

New York v. Hill, 528 U.S. 110 (2000) 6-8

Norris v. Schotten, 146 F.3d 314
(6th Cir. 1998) 4

Northern Pipeline Constr. Co. v.
Marathon Pipe Line Co., 458 U.S. 50 (1982) 7

Patton v. United States, 281 U.S. 276 (1930)
overruled on other grounds,
Williams v. Florida, 399 U.S. 78 (1970) 7

Peretz v. United States, 501 U.S. 923 (1991) 2-3, 7-10

TABLE OF CITATIONS - (Cont'd.)

Page

CASES - (Cont'd.)

Saldana v. United States, 206 Fed. App'x 843 (11th Cir. 2006) 4

Segurola v. United States, 275 U.S. 106 (1927) 8

Taylor v. Illinois, 484 U.S. 400 (1988) 6-8

United States v. Desir, 257 F.3d 1233 (11th Cir. 2001) 4

United States v. Gagnon, 470 U.S. 522 (1985) 8

United States v. Gamba, 483 F.3d 942 (9th Cir. 2007) 4

United States v. Maragh, 174 F.3d 1202 (11th Cir.), suppl. op. on reh'g, 189 F.3d 1315 (11th Cir. 1999) 4, 10

United States v. Ruiz-Rodriguez, 277 F.3d 1281 (11th Cir. 2002) 4

United States v. Woodard, 387 F.3d 1329 (11th Cir. 2004) 4

United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985) 9

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) 10

Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) 10

CONSTITUTIONAL PROVISION

U.S. Const. art. III 4-8

U.S. Const. amend. IV 8

TABLE OF CITATIONS - (Cont'd.)

Page

STATUTES AND RULES

18 U.S.C. § 3401(b) 10

Fed. R. Crim. P. 43 8

Fed. R. Crim. P. 51 9

Fed. R. Crim. P. 52(b) 9

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner, Homero Gonzalez, submits this reply to the Brief in Opposition ("BIO") filed by the United States.

I.

This United States Makes Two Significant Factual Representations In Its Brief That Have No Support In The Record.

In its brief, the United States makes two significant factual representations that have absolutely no support in the record and, indeed, are contradicted by the record. First, the United States asserts that petitioner was "present" during the "exchange" between the United States magistrate judge and counsel for the parties at the bench conference at the outset of the voir dire proceedings. See BIO, at 3; see also BIO, at 15 ("Petitioner's counsel, in petitioner's presence, expressly agreed to have the magistrate judge preside over jury selection."). The court reporter's transcription of the voir dire proceedings, which is attached as Appendix C to the petition for certiorari, clearly shows that petitioner was *not* at the bench during the exchange[1] and, furthermore, did not have the services of a Spanish-speaking interpreter at the time of the exchange. R. 151-52. The record also demonstrates that thereafter - when the attorneys stepped away

---

[1] The record shows that at the very outset of the proceedings the magistrate judge asked "*the attorneys* [to] approach the bench." R. 151 (emphasis added).

from the bench and petitioner was then afforded the assistance of an interpreter - the magistrate judge neither asked petitioner whether he also consented nor informed him that his attorney had done so outside of his presence. See id.

The United States's brief contains another factual error. In contending that Mr. Gonzalez's defense counsel consented to the magistrate judge's presiding over jury selection *on behalf of his client*, the United States points to the statement made by counsel in response to a question from the magistrate judge at the bench - "*we* are [going to consent]," R. 151 (emphasis added) - and claims that this statement is tantamount to the statement made by defense counsel in Peretz v. United States, 501 U.S. 923 (1991). See BIO, at 12-13. In Peretz, defense counsel was specifically asked by the magistrate judge whether counsel had his client's consent to have the magistrate judge select the jury, to which defense counsel responded affirmatively (in the presence of his client). Peretz, 501 U.S. at 925 & n.2.

The United States is incorrect that Mr. Gonzalez's defense counsel's use of the plural pronoun "we" expressly or impliedly referred to both counsel and his client, Mr. Gonzalez. Rather, when read in context, it is clear that the term "we" referred to the attorneys (*i.e.*, defense counsel and the prosecutor). Indeed, the prosecutor - *before* defense counsel stated, "[y]es, we are [consenting]" - also stated, "[y]es, *we* are [consenting], your

Honor" in response to the magistrate judge's question. R. 151 (emphasis added). In addition, Mr. Gonzalez was represented by two defense attorneys, both of whom were present at the bench conference, id., which also could explain counsel's use of the plural pronoun. Therefore, the United States's assertion that defense counsel's use of the term "we" demonstrates that he had obtained his client's personal consent is not supported by the record. And, for that reason, both the United States and the Fifth Circuit have erred in claiming that petitioner's case presents a "fact pattern" that is "almost identical" to that in Peretz. See BIO, at 5 (quoting from the Fifth Circuit's decision in petitioner's case). Rather, petitioner's case is distinguishable in a critically important way: unlike in Peretz, the record in petitioner's case unequivocally shows that defense counsel consented outside of petitioner's presence and did not inform the court that his client's consent (as opposed to the attorney's consent) was being given.

II.

The Legal Issue In Petitioner's Case Is Worthy Of This Court's Review.

The United States makes two arguments why certiorari should not be granted in petitioner's case: (1) the circuit split on the legal issue raised in petitioner's case is not significant enough; and (2) petitioner's case allegedly is a "poor vehicle" to decide

the issue because petitioner failed to object in the district court. See BIO, at 6-16. Neither argument has merit.

First, although the Eleventh Circuit is the only circuit court to have issued a decision *directly* contrary to the Fifth Circuit's decision in petitioner's case in a published decision, see BIO, at 11 (citing United States v. Maraqh, 174 F.3d 1202 (11th Cir.), suppl. op. on reh'g, 189 F.3d 1315 (11th Cir. 1999),[2] that precedent appears entrenched and the circuit split will thus persist in the future. See, e.g., Saldana v. United States, 206 Fed. App'x 843, 845 (11th Cir. 2006) (citing Maraqh approvingly); United States v. Woodard, 387 F.3d 1329, 1331-32 (11th Cir. 2004) (same); United States v. Ruiz-Rodriquez, 277 F.3d 1281, 1289-90 (11th Cir. 2002) (same); United States v. Desir, 257 F.3d 1233, 1236-37 (11th Cir. 2001) (same). A recent, cogent dissenting opinion by Ninth Circuit Judge Fisher in United States v. Gamba, 483 F.3d 942, 950-51 (9th Cir. 2007) (Fisher, J., dissenting) - in which he embraced the Eleventh Circuit's decision in Maraqh - also shows that the Eleventh Circuit's decision is not an aberration.

The United States's brief also highlights a larger circuit

---

[2] Other circuits have held that a litigant's waiver of the right to an Article III judge must be "voluntary, knowing, and intelligent." See, e.g., Norris v. Schotten, 146 F.3d 314, 326 (6th Cir. 1998) (citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Under such precedent, the failure to object by a defendant (particularly a Spanish-speaking one) who is totally ignorant of his counsel's consent to have a magistrate judge preside over a critical stage cannot be deemed "voluntary, knowing, and intelligent."

split that could be resolved by this Court in petitioner's case. The United States correctly notes that numerous circuits are divided on the threshold issue of whether some form of "affirmative consent" is required (by either a litigant or her counsel) for a magistrate judge to preside over a critical stage of a trial or whether a mere lack of objection, without more, satisfies the requirements for delegation to a magistrate judge under Article III and the Federal Magistrates Act. See BIO, at 9-11 (discussing conflicting decisions of the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). Therefore, petitioner's case also is worthy of this Court's review because it presents a vehicle to resolve that circuit split as well, insofar as it is undisputed that in the district court neither petitioner nor his attorney voiced an objection to the magistrate judge's presiding over jury selection. Although petitioner contends that this lack of objection is irrelevant (see Pet. 8-11), the fact that some circuits view a lack of objection as dispositive means that petitioner's case is a good vehicle for this Court to decide that threshold issue - in addition to the more specific issue of whether counsel's consent alone is sufficient, in the event that this Court were to hold that a lack of objection does not foreclose petitioner's claim on appeal.

Regardless of the significance of the foregoing circuit splits, however, the United States's brief entirely fails to

address the point (made in Mr. Gonzalez's petition for writ of certiorari) that the Fifth Circuit's decision conflicts with this Court's decisions in Commodities Future Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986), and New York v. Hill, 528 U.S. 110, 114-15 (2000), when read in conjunction. In Schor, this Court described the constitutional right to an Article III judge as "a personal right," albeit one subject to waiver. Schor, 478 U.S. at 848. In Hill, this Court stated that a criminal defendant need not "personally make an informed waiver" of most rights related to the conduct of a trial and that a defense attorney may waive such rights without the defendant's knowledge or participation in the waiver, Hill, 528 U.S. at 114-15; however, "[f]or certain fundamental rights, the defendant must *personally* make an informed waiver." Id. at 114 (emphasis added)(citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) (waiver of right to counsel); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (waiver of right to plead not guilty)); accord Taylor v. Illinois, 484 U.S. 400, 417-18 & n.24 (1988) (stating that "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client" and giving as examples the right to plead not guilty and have a trial; the right to a jury trial; and the right to be present during critical stages of trial) (citations omitted).

In discussing the waiver of the constitutional right to an

Article III judge, this Court in Schor equated that right to the most fundamental, "personal" rights of a criminal defendant - the very same type that this Court mentioned in Hill and Taylor (*i.e.*, those rights which, if waived, require a "personal" on-the-record waiver by a defendant). See Schor, 478 U.S. at 848 ("Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, *just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried.* See, e.g., Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (waiver of criminal trial by guilty plea); Duncan v. Louisiana, 391 U.S. 145, 158, [3]88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968) (waiver of right to trial by jury in criminal case).") (emphasis added).[4] Therefore, when read together, Schor, Hill, and Taylor provide that the fundamental, "personal" right to an Article III judge is the type of constitutional right that must be *personally* waived by a defendant as opposed to the type of right that may be waived by counsel alone without the defendant's knowledge and consent.

The United States errs in contending that this Court in Peretz

---

[3] This portion of this Court's decision in Duncan, which discussed waiver of the right to a jury trial, cited Patton, supra, which requires the defendant's "express and intelligent consent" for a waiver to be valid (Patton, 281 U.S. at 312). See Duncan, 391 U.S. at 158 & n.27.

[4] See also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (describing Article III's creation of an independent judiciary as a "fundamental principle").

"noted that the failure to raise a timely objection may result in the loss a host of ***personal*** constitutional rights. . . ." BIO, at 7-8 (citing cases) (emphasis added). None of the cases cited by the United States[5] involved the waiver of fundamental, personal constitutional rights.[6] Rather, each of those rights discussed in the cases cited in Peretz, although constitutional in nature, were of the type described by this Court in Hill as being subject to waiver or forfeiture by a defense attorney without the defendant's participation in the waiver. See Hill, 528 U.S. at 114-15. The right to an Article III judge, conversely, is the type of fundamental, personal constitutional right that can be waived only by a criminal defendant through "fully informed and publicly acknowledged consent" by the defendant himself. Taylor, 484 U.S. at 417-18. The Fifth Circuit's decision in petitioner's case is at odds with this important principle.

Finally, the United States's assertion that petitioner's case

---

[5] United States v. Gagnon, 470 U.S. 522, 528 (1985) (waiver of right to presence under Fed. R. Crim. P. 43); Levine v. United States, 362 U.S. 610 (1960) (waiver of right to a public trial); Segurola v. United States, 275 U.S. 106 (1927) (waiver of Fourth Amendment right to be free from unreasonable searches and seizures).

[6] Gagnon involved the waiver of the right to presence under Rule 43, not the constitutional right to presence. See Gagnon, 470 U.S. at 528. This Court has stated that the *constitutional* right to presence - as opposed to the much broader Rule 43 right to presence - is a "personal" right that a defendant can only waive through the "fully informed and publicly acknowledged consent of the [defendant]." Taylor, 484 U.S. at 417-18 & n.24 (citing Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963)).

is a "poor vehicle" to decide the legal issues raised by his case because he did not object in the district court, see BIO, at 13, is untenable. As petitioner explained in his petition for writ of certiorari (see Pet. 8-12), the very nature of the consent issue raised by petitioner necessarily means that it *was not raised in the district court*. As Justice Scalia stated in his dissenting opinion in Peretz (on a point not in conflict with the majority):

> As a general matter, of course, a litigant must raise all issues and objections at trial. . . . For criminal proceedings in the federal courts, this principle is embodied in Federal Rule of Criminal Procedure 51, which requires "a party, at the time the ruling or order of the [trial] court is made or sought, [to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor." Rule 51's command is not, however, absolute. . . . [P]etitioner plainly forfeited the right to advance his current challenges to the Magistrate's role. In certain narrow contexts, however, appellate courts have discretion to overlook a trial forfeiture. The most important of these is described in Federal Rule of Criminal Procedure 52(b): In criminal cases, an appellate court may notice "errors or defects" not brought to the attention of the trial court if they are "plain" and "affec[t] substantial rights." See United States v. Young, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, 1046, and n. 12, 84 L.Ed.2d 1 (1985). . . .
>
> Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 535-536, 82 S.Ct. 1459, 1464-1465, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.); Grosso v. United States, 390 U.S. 62, 71-72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); Hormel v. Helvering, 312 U.S. 552, 556-560, 61 S.Ct. 719, 721-723, 85 L.Ed. 1037 (1941). In my view, that course is appropriate here. Petitioner's principal claims are that the Federal Magistrates Act does not allow a district court to assign felony voir dire to a magistrate even with the defendant's consent, and that in any event the consent

here was ineffective because given orally by counsel and not in writing by the defendant. ***By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them, with the defendant's consent, to refer felony voir dire to a magistrate, and, if so, what form the consent must take.*** Cf. 18 U.S.C. § 3401(b) (defendant's consent to magistrate in misdemeanor trial must be in writing).

Given the impediments to the proper assertion of these claims, I believe we are justified in reaching the statutory issue today to guide the district courts in the future performance of their duties. It is not that we must address the claims because all legal questions require judicial answers, cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982); Webster v. Doe, 486 U.S. 592, 612-613, 108 S.Ct. 2047, 2058-2059, 100 L.Ed.2d 632 (1988) (SCALIA, J., dissenting), but simply that the relevant rules and statutes governing forfeiture, as we have long construed them, recognize a limited discretion which it is eminently sensible to exercise here.

Peretz, 501 U.S. at 953-55 (Scalia, J., dissenting); accord Maragh, 189 F.3d at 1316-17 (citing Judge Scalia's opinion with approval).

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Mr. Gonzalez's petition for writ of certiorari, this Court should grant the writ of certiorari.

Date:
August 9, 2007

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

BRENT E. NEWTON
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 310
Houston, Texas 77002-1634
Telephone: (713) 718-4600

57285

(6)

No. 06-11612

FILED

DEC 19 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
H. MICHAEL SOKOLOW
First Assistant Federal
Public Defender
TIMOTHY CROOKS
BRENT E. NEWTON*
Assistant Federal
Public Defenders
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
(713) 718-4600
Brent_Newton@fd.org
Counsel for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. INTRODUCTION 1

B. WHETHER A DEFENDANT MUST AFFIRMATIVELY AND PERSONALLY WAIVE HIS RIGHT TO AN ARTICLE III JUDGE AT FELONY JURY SELECTION IS AN OPEN AND SERIOUS CONSTITUTIONAL QUESTION 2

1. Contrary To The Government's Reading of *Peretz*, The Right To Jury Selection By An Article III Judge Does Not Materialize Only Upon Demand 2

2. *Peretz* Does Not Allow Defense Counsel To Unilaterally Waive A Defendant's Right To An Article III Judge At Jury Selection 7

3. Jury Selection By An Article III Judge Is A Fundamental Right That, If Waived, Requires An Affirmative, Personal Waiver By A Defendant 11

C. AS PART OF CONSTITUTIONAL AVOIDANCE, THE COURT SHOULD IMPORT 18 U.S.C. § 3401(b) INTO 28 U.S.C. § 636(b)(3) 18

D. THE PLAIN-ERROR STANDARD DOES NOT APPLY TO PETITIONER'S CLAIM 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Beck v. Ohio, 369 U.S. 541 (1962) 13

Boykin v. Alabama, 395 U.S. 238 (1969) 26

Brecht v. Abrahamson, 507 U.S. 619 (1993) 8, 18

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) ..... *passim*

Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) 5, 20

Duncan v. Louisiana, 391 U.S. 145 (1968) 6, 7

Faucher v. Lopez, 411 F.2d 992 (9th Cir. 1969) 20

Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919) 20

Florida v. Nixon, 543 U.S. 175 (2004) 17

Freytag v. Comm'r, 501 U.S. 868 (1991) 23

Gerstein v. Pugh, 420 U.S. 103 (1975) 13

Gomez v. United States, 490 U.S. 858 (1989) 2, 3, 9, 10, 11

Gonzalez v. United States, 128 S. Ct. 32 (2007) 3

Hurtado v. California, 110 U.S. 516 (1884) 13

Johnson v. United States, 520 U.S. 461 (1997) 25

Larson v. Tansy, 911 F.2d 392 (10th Cir. 1990) 5, 22

Levine v. United States, 362 U.S. 610 (1960) 5, 14

McKane v. Durston, 153 U.S. 684 (1894) 16

New York v. Hill, 528 U.S. 110 (2000) 11

TABLE OF AUTHORITIES – Continued

Page

Nguyen v. United States, 539 U.S. 69 (2003) 27

Patton v. United States, 281 U.S. 276 (1930) 7, 13

Peretz v. United States, 498 U.S. 1066 (1991) 8

Peretz v. United States, 501 U.S. 923 (1991) ....*passim*

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'shp, 507 U.S. 380 (1993) 21

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 14

Roell v. Withrow, 538 U.S. 580 (2003) 18, 20, 21, 27

Rose v. Mitchell, 443 U.S. 545 (1979) 13

Smith v. United States, 360 U.S. 1 (1959) 13

Taylor v. Illinois, 484 U.S. 400 (1988) 5, 11, 16, 20

United States v. Boyd, 86 F.3d 719 (7th Cir. 1996) 14

United States v. Ciapponi, 77 F.3d 1247 (10th Cir. 1996) 15

United States v. Dominguez Benitez, 542 U.S. 74 (2004) 24, 25, 26

United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985) 13

United States v. Gagnon, 470 U.S. 522 (1985) 4, 5

United States v. Gamba, 483 F.3d 942 (9th Cir. 2007) 3, 6, 13, 17

United States v. Hatter, 532 U.S. 557 (2001) 13

United States v. Mezzanatto, 513 U.S. 196 (1995) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Moore, 340 U.S. 616 (1951).....7

United States v. Olano, 507 U.S. 725 (1993).....4, 24, 27

United States v. Ortiz, 82 F.3d 1066 (D.C. Cir. 1996).....14, 15

United States v. Reyna-Tapia, 328 F.3d 1114 (9th Cir. 2003).....15

United States v. Sims, 428 F.3d 945 (10th Cir. 2005).....3

United States v. Vonn, 535 U.S. 55 (2002).....24, 25, 26

United States v. Young, 470 U.S. 1 (1985).....27

Waller v. Georgia, 467 U.S. 39 (1984).....16

Yakus v. United States, 321 U.S. 414 (1944).....24

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III .....*passim*

U.S. Const. Art. III, § 1.....13

STATUTES AND RULES

18 U.S.C. § 3401(b).....*passim*

28 U.S.C. § 636 7

28 U.S.C. § 636(b)(3).....*passim*

28 U.S.C. § 636(c) 18

Fed. R. Civ. P. 38.....7

Fed. R. Civ. P. 38(d).....6, 20

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Crim. P. 11 ..... 25, 26

Fed. R. Crim. P. 32(j) 16

Fed. R. Crim. P. 43 5

Fed. R. Crim. P. 51(b) 1, 23

Fed. R. Crim. P. 52(b) ..... *passim*

MISCELLANEOUS

Joint Appendix, *Peretz v. United States*, No. 90-615 4

Brief of the United States in Opposition, *Peretz v. United States*, No. 90-615, 1990 WL 10022950 4

ARGUMENT

A. INTRODUCTION

The Government seeks to short-circuit application of the constitutional avoidance doctrine by arguing there is no constitutional requirement that a defendant affirmatively and personally waive his right to an Article III judge at jury selection and, thus, that delegation to a magistrate judge under 28 U.S.C. § 636(b)(3) is proper without such a waiver. U.S. Br. 16-17. This contention is also central to the Government's position that trial counsel's failure to object below should be imputed to petitioner for purposes of Federal Rules of Criminal Procedure 51(b) and 52(b). *See* U.S. Br. 34. The premise supporting these related arguments is erroneous and is based on a misinterpretation of *Peretz v. United States*, 501 U.S. 923 (1991).

As explained below, the Government's premise is actually an open question: whether the Constitution permits defense counsel to unilaterally waive the defendant's right to an Article III judge at felony jury selection. There *is*, therefore, a serious constitutional question to be avoided, and the Government has offered no credible argument why the Court should not, as a means of constitutional avoidance, interpret § 636(b)(3) as petitioner has proposed.

B. WHETHER A DEFENDANT MUST AFFIRMATIVELY AND PERSONALLY WAIVE HIS RIGHT TO AN ARTICLE III JUDGE AT FELONY JURY SELECTION IS AN OPEN AND SERIOUS CONSTITUTIONAL QUESTION.

1. Contrary To The Government's Reading Of *Peretz*, The Right To Jury Selection By An Article III Judge Does Not Materialize Only Upon Demand.

The Government initially claims that the rule to be distilled from *Peretz* and *Gomez v. United States*, 490 U.S. 858 (1989), is that a defendant has a right to an Article III judge at felony jury selection only if the defense objects to the magistrate judge's role or demands an Article III judge. According to the Government, without such an objection or demand, the right to an Article III judge never materializes and, thus, no affirmative waiver of such a right is required. *See, e.g.*, U.S. Br. 14 ("[A] defendant has no constitutional right to have an Article III judge supervise *voir dire* absent an objection or demand by the defense.").[1]

---

[1] This initial argument by the Government presumably would be the same in a case – unlike petitioner's – in which a magistrate judge had not solicited consent from defense counsel and, instead, simply selected the jury without any objection from defense counsel or the defendant.

The Government's interpretation of *Peretz* in support of its position is erroneous. Exploiting ambiguity in the Court's decision,[2] the Government selectively quotes from passages discussing the need for an "objection" or "demand." *See, e.g., Peretz*, 501 U.S. at 936. Several other passages in *Peretz*, however, require a defendant's "consent" to felony jury selection by a magistrate judge[3] or speak of a defendant's "waiver" of the right to an Article III judge.[4] "Consent," even in its most basic sense, necessarily means more than mere silence. *See United States v. Sims*, 428 F.3d 945, 953 (10th Cir. 2005) (discussing "consent" in the Fourth Amendment context and stating that it at least involves "mental awareness so that the act of consent was that of one who knew what he was doing"). Similarly, a "waiver" of a fundamental right in criminal cases requires the knowing and

---

[2] *See United States v. Gamba*, 483 F.3d 942, 951 (9th Cir. 2007) (Fisher, J., dissenting) (noting such "ambiguity").

[3] *See, e.g., Peretz*, 501 U.S. at 932 ("[T]he defendant's consent significantly changes the constitutional analysis."); *id.* at 936 ("There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent."); *see also Gomez*, 490 U.S. at 870 ("[a] crucial limitation on [magistrate judges' authority] is consent").

[4] *Peretz*, 501 U.S. at 936 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986)). As reframed by the Court, the first question presented in petitioner's case certainly appears to assume that a defendant has a "right" to an Article III judge at jury selection by default; the only issue concerns the procedure by which the right can be waived. *See Gonzalez v. United States*, 128 S. Ct. 32, 33 (2007).

intentional relinquishment of that right. *United States v. Olano*, 507 U.S. 725, 733 (1993).

Therefore, any reference in *Peretz* to the requirement of an "objection" or "demand" must be read in light of the "crucial" need for "consent" or "waiver." *Peretz*, 501 U.S. at 931 n.8 & 933. Under *Peretz*, a defendant's failure to object to a magistrate judge's participation or to demand an Article III judge at jury selection, by itself, does not operate as a waiver. Rather, a defendant's silence is relevant only *after* he has consented – either personally or, as in *Peretz*, through defense counsel in the defendant's immediate presence with the specific confirmation that the defendant himself has consented. *Peretz*, 501 U.S. at 925 & n.2.[5] That scenario is materially different from what occurred in petitioner's case, in which defense counsel unilaterally consented to the magistrate judge outside of the earshot of petitioner and without a statement that petitioner himself had knowingly consented.

The Government also overstates the significance of *United States v. Gagnon*, 470 U.S. 522 (1985) (*per*

---

[5] Peretz was in his counsel's presence when the latter stated that his "client" consented. *See* Joint Appendix 4-5, *Peretz v. United States*, No. 90-615; *see also* Brief of the United States in Opposition, *Peretz*, *supra*, 1990 WL 10022950, at *2 (filed Nov. 1, 1990) ("[T]he magistrate to whom jury selection had been assigned again inquired *in petitioner's presence* whether petitioner wished to consent to have the magistrate preside over jury selection. Petitioner's counsel again gave his express consent.") (emphasis added).

curiam), and *Levine v. United States*, 362 U.S. 610 (1960), two of the cases cited by the Court in *Peretz* for the general proposition that, like the right to an Article III judge, "[t]he most basic rights of criminal defendants are similarly subject to waiver." *Peretz*, 501 U.S. at 936. The Government interprets the Court's citation of these cases in *Peretz* as standing for the proposition that the right to an Article III judge is "lost if not affirmatively asserted by the defendant." U.S. Br. 15 n.3. However, in *Gagnon* and *Levine*, which addressed (respectively) waivers of a criminal defendant's right to presence under Federal Rule of Criminal Procedure 43[6] and a defendant's constitutional right to have a "public" trial, the Court was careful to observe that the alleged deprivations of these rights had occurred in the immediate presence of *both* defense counsel *and* their clients without objection.[7] Petitioner's case, as noted, is clearly distinguishable in this respect. In

---

[6] Contrary to the Government's apparent interpretation of *Gagnon* – as having held that a defendant's *constitutional* right to presence during all critical stages of trial is waived by a mere lack of objection, *see* U.S. Br. 15 n.3, 26 – the Court's discussion of waiver in *Gagnon* was limited to the *non-constitutional* right to presence under Rule 43. *See Gagnon*, 470 U.S. at 525-30 (discussing the defendant's waiver of his Rule 43 claim only after first concluding that no constitutional violation occurred). The Court in *Taylor v. Illinois*, 484 U.S. 400 (1988), subsequently stated that the *constitutional* right to presence can be waived only through the "fully informed and publicly acknowledged consent of the [defendant]." *Id.* at 417-18 & n.24 (citing *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963)); *accord Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir. 1990).

[7] *See Gagnon*, 470 U.S. at 523; *Levine*, 362 U.S. at 617-20.

any event, "the Court [in *Peretz*] was invoking these cases to illustrate that the right to an Article III judge at a critical stage of a criminal trial is *subject* to waiver if the defendant consents, not to resolve the nature of that consent in all cases." *Gamba*, 483 F.3d at 953 n.1 (Fisher, J., dissenting) (emphasis in original).

Judge Fisher clearly was correct concerning the Court's citation of such cases in *Peretz* because, as petitioner has observed (Pet. Br. 28-29), the Court in *Schor* specifically indicated that waiver of the right to an Article III judge requires a defendant's affirmative, personal consent. *Schor*, which was cited by the Court in *Peretz* (501 U.S. at 936), equated a litigant's "consent" to have a non-Article III adjudicator with "waiver" of the right to an Article III judge and specifically analogized such waiver to the type of affirmative waiver required when a criminal defendant relinquishes the right to a jury. *See Schor*, 478 U.S. at 848-49 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, *just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.*") (emphasis added; citing, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968), and Fed. R. Civ. P. 38(d)).[8] In criminal

---

[8] The Government's attempt to distinguish *Schor* on the ground that it involved a civil litigant's complete waiver of the right to an Article III judge, while *Peretz* involved waiver of that right during only one critical stage of a federal felony trial, *see*

(Continued on following page)

cases, waiver of the right to a jury trial requires an affirmative, personal waiver by the defendant. *Patton v. United States*, 281 U.S. 276, 312 (1930); *see also Duncan*, 391 U.S. at 158 & n.27 (citing *Patton*).[9]

2. *Peretz* Does Not Allow Defense Counsel To Unilaterally Waive A Defendant's Right To An Article III Judge At Jury Selection.

The Government alternatively – and erroneously – contends that, if affirmative waiver of some type is required, then *Peretz* "refutes the contention that a defendant must personally and explicitly waive his right to have an Article III judge preside over *voir dire*." U.S. Br. 13. Initially, the Government's argument fails to appreciate that *Peretz* did not resolve the form-of-consent issue. The Court simply *assumed* valid consent by the defendant in *Peretz*, which is confirmed by the questions presented as reframed by the Court.[10] The scope of the grant of certiorari thus

---

U.S. Br. 25, is unpersuasive. The right to have an Article III judge conduct felony jury selection is certainly no less important than the right to an Article III judge in a civil case. *Peretz*, 501 U.S. at 933.

[9] Conversely, in federal civil cases, a litigant's right to a jury trial under the Seventh Amendment is waived by a failure to demand it. *United States v. Moore*, 340 U.S. 616, 621 (1951) (citing Fed. R. Civ. P. 38).

[10] The two questions concerning "consent" were: (1) "Does 28 U.S.C., Section 636, permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?" and (2) "If 28 U.S.C., Section 636, permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the

(Continued on following page)

did not include what particular *form* of "consent" is necessary, and the Court's assumption that Peretz's consent was sufficient cannot be treated as a holding of the Court. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (prior assumption of the Court, the validity of which was not addressed in the prior case, is not binding in a subsequent case in which the issue is actually raised).

Even assuming *Peretz* can be read to have implicitly addressed the issue of whether the defendant's consent was sufficient to bestow authority on the magistrate judge in that case, *Peretz* does not resolve the issue in petitioner's case, which involved counsel's unilateral waiver. In support of its erroneous reading of *Peretz*, the Government first points to the Court's statement that the facts of *Peretz* "differ[] critically from *Gomez* because *petitioner's counsel*, rather than objecting to the Magistrate's role, affirmatively welcomed it." *Peretz*, 501 U.S. at 932 (emphasis added). The Government next contends that *Peretz* refused to require personal consent from the defendant because the majority "did not adopt the view of three dissenting Justices that counsel's consent was insufficient" under 18 U.S.C. § 3401(b). U.S. Br. 14 (citing *Peretz*, 501 U.S. at 947 n.6 (Marshall, J., dissenting)). Finally, the Government (U.S. Br. 14) points to language in a footnote of the majority opinion stating

---

statute consistent with Article III?" *Peretz v. United States*, 498 U.S. 1066 (1991).

that "[w]e are confident that . . . *defense counsel* can sensibly balance these considerations [about the difficulty of meaningful judicial review by an Article III judge of jury selection] in deciding whether to object to a magistrate's supervision of *voir dire*." *Peretz*, 501 U.S. at 935 n.12 (emphasis added).

None of these three passages can bear the weight the Government places on them. The Court's reference to the fact that Peretz's counsel "affirmatively welcomed" the magistrate judge's role in that case rather than "objecting" must be read in the context of the Court's earlier reference to counsel's express statement – in his client's presence and without contradiction – that his "client" consented. *Id.* at 925 & n.2. This fact undermines whatever inferential value that the Government seeks to place on the Court's later reference to *counsel's* "welcom[ing]" the role of the magistrate judge. The Government's inference also is belied by the sentence that follows the above-quoted passage: "The considerations that led to our holding in *Gomez* do not lead to the conclusion that a magistrate's 'additional duties' may not include supervision of jury selection *when the defendant has consented.*" 501 U.S. at 932 (emphasis added).

The Government's claim that the majority in *Peretz* rejected the argument made in footnote 6 of Justice Marshall's dissenting opinion is untenable. As Justice Marshall observed in that footnote, the majority simply *assumed* that the defendant himself – in addition to his counsel – had given valid consent. *See Peretz,* 501 U.S. at 947 n.6 (Marshall, J., dissenting).

The majority thus had no reason to address Justice Marshall's alternative argument, and the majority's lack of response should not be deemed a holding that an attorney can unilaterally waive a defendant's right to a district judge at felony jury selection.

The Government's reliance on footnote 12 of the majority opinion in *Peretz* is likewise misplaced. The Court's reference to the option of "defense counsel" to object or not object to a magistrate judge's role in jury selection says nothing about whether the defendant himself must personally waive his right to an Article III judge even if defense counsel does not object. Indeed, the very next sentence in the footnote says: "We stress, in this regard, that *defendants* may *waive* the right to judicial performance of other important functions. . . ." *Peretz*, 501 U.S. at 935 n.12 (emphasis added).

In addition to reading too much into these three passages, the Government fails to account for other portions of *Peretz* that assumed that defense cannot unilaterally consent. *See Peretz*, 501 U.S. at 933 ("Construing [the Federal Magistrates Act] absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to *all participants in the trial process*. . . .") (emphasis added); *id.* at 934 ("If a criminal defendant, *together with his attorney*, believes that the presence of a [district] judge best serves his interests during the selection of the jury, then *Gomez* preserves his right to object to the use of a magistrate.") (citation

omitted; emphasis added); *cf. Gomez*, 490 U.S. at 870-71 & n.21 (quoting from legislative history of 18 U.S.C. § 3401(b), in which it was stated that "magistrates will be used only as the bench, bar, *and litigants* desire [and] only in cases where they are felt by *all participants* to be competent") (citations omitted; emphasis added). Read as a whole, *Peretz* does not support the Government's contentions.

3. Jury Selection By An Article III Judge Is A Fundamental Right That, If Waived, Requires An Affirmative, Personal Waiver By A Defendant.

In addition to misconstruing *Peretz*, the Government fails to rebut petitioner's arguments on pages 22 through 31 of his opening brief. Petitioner there discussed the significance of the Court's common citation in *Schor*, *Taylor*, *Gomez*, and *New York v. Hill*, 528 U.S. 110 (2000), to the line of precedent concerning "basic" constitutional rights that require a defendant's express, personal waiver of such rights for the waiver to be constitutionally effective (*e.g.*, the right to a criminal jury). Seeking to have the Court resolve the serious constitutional question in this case,[11] the Government contends that the right to an

---

[11] By responding to the Government's argument, petitioner does not likewise seek to have the Court answer the constitutional question. His arguments are meant to show that there is a serious constitutional issue to avoid by interpreting the Federal

(Continued on following page)

Article III judge at jury selection does not fall within this "limited class of fundamental rights" and, therefore, that defense counsel can unilaterally waive that right as a matter of "strategy." U.S. Br. 17-21. The Government claims that the decision of "which neutral judicial officer should preside over one stage of the criminal proceeding[,] the selection of the jury," is not one that has a "pervasive impact" on the trial in the same way that the waiver of the right to a jury or counsel does, and that a magistrate judge is "not inherently unfit" to pick a felony jury. *Id.* at 20-21.

The basic premise underlying the Government's argument is fundamentally flawed. The choice between an Article III judge and a magistrate judge is not simply the choice between two "neutral judicial officers." Rather, it is the choice between two qualitatively different judicial officers from the perspective of Article III's allocation of federal "judicial [p]ower." The question is not whether magistrate judges are "unfit"; rather, it is whether they are the type of judicial officers envisioned by the Framers to preside over felony jury selection in a federal case. Because they are not, they cannot preside absent a valid waiver of the right to an Article III judge by a defendant.

The Government's argument also proves too much. That a magistrate judge is capable of competently and impartially performing the judicial tasks

---

Magistrates Act to require a defendant's express, personal waiver of the right to an Article III judge at felony jury selection.

involved in jury selection does not mean that defense counsel can unilaterally waive a defendant's right to an Article III judge at jury selection. The same could be said of a defendant's personal rights to grand and petit juries in a federal felony case. Decision-makers other than grand juries are not "inherently unfit" to find probable cause and bring formal charges,[12] yet waiver of the right to an indictment by a federal grand jury cannot be accomplished by defense counsel unilaterally.[13] And district judges certainly are not "inherently unfit" to decide whether the prosecution has proved a federal defendant's guilt beyond a reasonable doubt, yet defendants must personally waive the right to a petit jury. *Patton*, 281 U.S. at 312.

The rights to federal grand and petit juries and the right to an Article III judge each reflect important constitutional value judgments made by the Framers.[14] Such value judgments concern the *identity of*

---

[12] *See Beck v. Ohio*, 369 U.S. 541, 545 (1962); *cf. Gerstein v. Pugh*, 420 U.S. 103, 112-19 (1975). The Court has long recognized grand juries are not constitutionally required in state felony cases. *Hurtado v. California*, 110 U.S. 516 (1884); *accord Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979).

[13] *United States v. Ferguson*, 758 F.2d 843, 850-51 (2d Cir. 1985); *see also Smith v. United States*, 360 U.S. 1, 6 & n.4 (1959).

[14] The Government's suggestion that the right to have an Article III judge conduct felony jury selection is a "modest" or "technical" right (U.S. Br. 47) "trivializes the nature and import of having an Article III judge preside over the critical phases of a felony trial." *Gamba*, 483 F.3d at 952 (Fisher, J., dissenting); *see also United States v. Hatter*, 532 U.S. 557, 567-70 (2001) (discussing the importance of Art. III, § 1, to the Framers).

decision-makers in a federal criminal case as opposed to the constitutional rules that otherwise govern the criminal adjudication process (*e.g.*, a defendant's rights under the Confrontation Clause and Compulsory Process Clause). Simply because there are alternative means of fairly and effectively performing the tasks constitutionally assigned to grand and petit juries and Article III judges in federal criminal cases does not mean that defendants' fundamental rights to these decision-makers can be unilaterally waived by defense counsel.

In a similar vein, the Government errs in arguing that the waiver of the right to have an Article III judge preside over jury selection is more akin to defendants' waivers of the right to testify, the right to appeal, the right to a public trial, and the various procedural rights related to selecting jurors, none of which require an on-the-record affirmative waiver by a defendant.[15] The right to testify, while a "personal" right of a defendant that counsel cannot unilaterally waive, *see Ortiz*, 82 F.3d at 1070, is not ordinarily waived in an express manner by a defendant because requiring such an on-the-record waiver conducted by

---

[15] *See Roe v. Flores-Ortega*, 528 U.S. 470, 478-80 (2000) (right to appeal); *Levine*, 362 U.S. at 619 (right to public trial); *United States v. Ortiz*, 82 F.3d 1066, 1069-70 & n.8 (D.C. Cir. 1996) (right to testify); *United States v. Boyd*, 86 F.3d 719, 723 (7th Cir. 1996) (decisions about whether to exercise challenges for cause with respect to prospective jurors are "entrusted to counsel rather than to defendants personally"); *see also* U.S. Br. 18, 23, 26, 28.

a judge potentially would "interfere[ ] with the client-counsel relationship . . . [and] disrupt[ ] trial strategy." *Id.* at 1069-70. The Government's suggestion that an on-the-record personal waiver of a defendant's right to an Article III judge at jury selection similarly would disrupt the attorney-client relationship is baseless. Unlike a defendant's right to testify – the invocation or non-invocation of which is the most important "strategic" decision in many trials – the right to an Article III judge at jury selection can be waived without any significant infringement on the defense's strategy or the attorney-client relationship. Indeed, no one has ever suggested that a defendant's personal, express waiver of the right to an Article III judge in a federal misdemeanor case, as required by 18 U.S.C. § 3401(b), in any manner disrupts defense strategy or the attorney-client relationship. And, as petitioner has noted, in the same courthouse where petitioner was tried, magistrate judges regularly solicit defendants' personal, express waivers of the right to an Article III judge at felony guilty plea hearings. *See* Pet. Br. 40-41.[16]

---

[16] Since *Peretz*, such personal waivers regularly occur in many other federal districts and typically involve a defendant's execution of a written waiver. *See, e.g., United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir. 2003) (*en banc*); *United States v. Ciapponi*, 77 F.3d 1247, 1249 (10th Cir. 1996). This apparently uniform practice of obtaining a defendant's express, personal consent in the guilty plea context is telling: it suggests that the district courts have interpreted *Peretz* to require such personal consent.

The Government's analogy to the right to appeal is also inapposite. The right to appeal, which is waived by the failure to file a timely notice of appeal, differs significantly from the constitutional "right" or "privilege"[17] of an Article III judge. There is no constitutional right to appeal. *McKane v. Durston*, 153 U.S. 684, 687-88 (1894). In any event, waiver of the right to appeal through the omission of a timely notice of appeal is preceded by an express admonishment from a judge that the defendant has the right to appeal. *See* Fed. R. Crim. P. 32(j).

The Government's argument that the right to a public trial is equivalent to the right to an Article III judge for waiver purposes is mistaken. The function of the right to a public trial is to allow the scrutiny of public spectators to aid in the fair treatment of the accused and to help uncover the truth. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). That right is much more analogous to the defendant's rights under the Confrontation Clause or Compulsory Process Clause, which similarly seek to promote the adversarial truth-finding process and which can be unilaterally waived by defense counsel. *See Taylor*, 484 U.S. at 417-18 & n.24.

Finally, the Government errs by attempting to liken the decision to allow a magistrate judge to

---

[17] *Peretz*, 501 U.S. at 929-30 & n.6; *see also Schor*, 478 U.S. at 848-49 (recognizing "[a]s a personal right, Article III's guarantee of an impartial and independent federal adjudication").

conduct felony jury selection to the many decisions made by counsel in selecting a jury. These myriad discrete strategic decisions (which occur *during* jury selection) are different in kind, and not merely in degree, from the single decision of whether to waive an Article III judge *before* jury selection begins.

Waiving the right to an Article III judge at felony jury selection is not a mere "strategic" decision within the province of counsel's sole discretion. Although the Government is "undoubtedly correct that an attorney will be best equipped to understand the legal concerns at issue," "such is the case in all legal decisions that we reserve to the defendant personally," such as waiving the right to a jury. *Gamba*, 483 F.3d at 953 (Fisher, J., dissenting); *cf. Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (acknowledging that "[w]hile a guilty plea may be tactically advantageous for the defendant, . . . the plea is not simply a strategic choice" that can be made solely by defense counsel).

At the very least, as the foregoing discussion demonstrates, the argument that the Constitution requires a personal waiver by the defendant of his right to an Article III judge at felony jury selection is a serious question. The Court can and should avoid answering that question by interpreting 28 U.S.C. § 636(b)(3) to require such a waiver.

C. AS PART OF CONSTITUTIONAL AVOIDANCE, THE COURT SHOULD IMPORT 18 U.S.C. § 3401(b) INTO 28 U.S.C. § 636(b)(3).

The Government tellingly devotes a scant portion of its brief to petitioner's argument that the express waiver provision of 18 U.S.C. § 3401(b) should inform the Court's interpretation of 28 U.S.C. § 636(b)(3), as a means of constitutional avoidance in this case. *See* U.S. Br. 30-32. The Government gives three reasons supporting its contention that there is no "plausible basis for importing the Section 3401(b) requirements" into § 636(b)(3). U.S. Br. 30. First, the Court in *Peretz* previously refused to do so. Second, Congress, had it considered the issue, would not have intended such a waiver requirement for delegations under 28 U.S.C. § 636(b)(3) because felony jury selection is not equivalent to complete delegation in a misdemeanor case.[18] And, third, the Court in *Roell v. Withrow*, 538 U.S. 580 (2003), rejected such a waiver requirement with respect to analogous delegations under § 636(c) in civil cases. None of these contentions have any merit.

---

[18] The Government errs by stating that "Congress's failure to act in the wake of *Peretz* suggests that Congress chose" not to require express, personal consent from a defendant for delegation of felony jury selection. U.S. Br. 31. The Court repeatedly has stated that it is "reluctant to draw inferences from Congress's failure to act." *Brecht*, 507 U.S. at 632-33. The Court should not draw any inference here. As discussed above, *Peretz* did not resolve the form-of-consent issue and, thus, Congress would have had nothing to tacitly approve.

First, as explained above, the Court in *Peretz* did not reject Justice Marshall's alternative argument (made in a footnote in his dissenting opinion) that a defendant's consent to delegation of felony jury selection to a magistrate judge should comply with § 3401(b). The majority had no reason to respond to his argument because the Court *assumed*, without deciding, that Peretz's consent was valid. *See supra* text, at 9-10. Because the defendant's consent was assumed sufficient, there was no constitutional doubt in applying § 636(b)(3) to the facts of *Peretz*, and thus no need to consider § 3401(b)'s requirements as a model for interpreting § 636(b)(3) to avoid such doubt.

Second, the Government errs by suggesting that Congress "could well have concluded" that delegation of felony jury selection is not equivalent to delegation of a misdemeanor trial and, thus, would not have required "such a high level of personal consent." U.S. Br. 31. The Court in *Peretz*, however, believed that a magistrate judge's supervision of felony jury selection is "comparable in responsibility and importance" to delegation of an entire misdemeanor case to a magistrate judge. *Peretz*, 501 U.S. at 933. As reflected in both the plain language and the legislative history of § 3401(b), Congress clearly believed that waiver of the constitutional right to an Article III judge in misdemeanor cases requires a "high level of personal consent." *See* NACDL *et al.* Amicus Brief 18-25. It defies logic to say that Congress, had it intended felony jury selection to be delegated to magistrate

judges, would not have required the same type of personal waiver.

Finally, the Government's reliance on *Roell* is misplaced for several reasons. First, *Roell* is distinguishable in that the respondent (who had given express, personal consent) complained that the petitioners' implied consent was insufficient to bestow authority on the magistrate judge under the Federal Magistrates Act. *See Roell*, 538 U.S. at 589-90. Because the respondent in *Roell* (unlike petitioner here) was not complaining that his *own* right to an Article III judge was violated, constitutional avoidance was not paramount in that case. Second, as petitioner discussed in his opening brief (Pet. Br. 42-43 n.33), *Roell* interpreted the civil delegation provision of the Federal Magistrates Act, which not only has different statutory language but also applies to an entirely different class of litigants. *Cf.* Fed. R. Civ. P. 38(d) (civil litigant's mere failure to demand a jury trial constitutes a waiver of the Seventh Amendment right to a civil jury). Third, unlike criminal defendants, who possess a constitutional right to be present during all critical stages of trial,[19] civil litigants do not possess an equivalent constitutional right to be present, *see, e.g.*, *Faucher v. Lopez*, 411 F.2d 992, 996 (9th Cir. 1969), at least when they are represented by counsel. *See Fillippon v. Albion Vein Slate Co.*, 250

[19] That right must be waived by defendants personally. *See Taylor*, 484 U.S. at 417-18 & n.24 (citing *Cross*, 325 F.2d at 631-32).

U.S. 76, 81 (1919) (stating that civil litigants should be permitted "to be present in person *or* by counsel") (emphasis added). In federal civil cases, the acts and omissions of counsel regarding waiver of a litigant's right to an Article III judge – like waiver of any other right in civil cases – are imputed to counsel's client. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'shp*, 507 U.S. 380, 396-97 (1993).[20] Finally, in *Roell* – just as in *Peretz* – the consent to have a magistrate judge preside that was given by the petitioners in both cases, while not express (*i.e.*, from the mouths of the petitioners themselves), was implied (*i.e.*, knowingly evinced by their conduct). *Roell*, 538 U.S. at 584 & n.1 (at jury selection, the magistrate judge announced in open court that "both sides had consented to her jurisdiction to hear the case" without objection); *see also Peretz*, 501 U.S. at 925 & n.2. In that way, "the Article III right [was] substantially honored" by such knowing, implied consent. *Roell*, 538 U.S. at 590; *cf. Schor*, 478 U.S. at 849-50. The same cannot be said of petitioner's case. The record reflects absolutely no consent, express or implied, by petitioner. Pet. Br. 3-5.

In sum, the Government has not allayed the serious constitutional concerns raised by the delegation of

---

[20] Therefore, the statement in *Roell* that "the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge," *Roell*, 538 U.S. at 590, has no relevance in petitioner's criminal case.

jury selection to the magistrate judge in petitioner's case. To avoid such doubt, the Court should fill the gap in § 636(b)(3) in the manner that petitioner has proposed. Finally, even if the Court were not to import the waiver requirement of § 3401(b),[21] the Court should require at least the type of knowing acquiescence by the defendant that occurred in *Peretz*. *Cf. Larson v. Tansy*, 911 F.2d 392, 397 (10th Cir. 1990) ("Although it may be possible to effectuate a waiver [of the defendant's right to presence] without a formalistic process, the facts of this case do not support a holding that this defendant waived his right. . . .").

D. THE PLAIN-ERROR STANDARD DOES NOT APPLY TO PETITIONER'S CLAIM.

The Government fails to refute petitioner's arguments that the plain-error standard does not apply to his form-of-consent claim and also wrongly contends that petitioner has not shown reversible plain error (in the event the standard does apply).

---

[21] Assuming the Court concludes that Congress would have enacted a waiver provision like the one in § 3401(b) had it intended felony jury selection to be delegated to magistrate judges, nothing less would suffice to effect a valid waiver under § 636(b)(3). *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("an express waiver clause may suggest that Congress intended to occupy the field and preclude waiver under other, unstated circumstances").

With respect to the threshold question of whether the standard applies, the Government's initial argument – that trial counsel's acts and omissions are attributable to petitioner under Federal Rules of Criminal Procedure 51(b) & 52(b) – turns on its mistaken view that waiver of the right to an Article III judge at jury selection does not require a defendant's affirmative, personal waiver. U.S. Br. 33-34. If the Court concludes that an affirmative, personal waiver is required, then exclusion of petitioner from the bench conference, where the magistrate judge solicited only counsel's consent, deprived him of the "opportunity to object"[22] – particularly when petitioner's own characteristics, including his lack of fluency in English and lack of experience in the federal criminal justice system, are considered.[23]

The Government also fails to rebut petitioner's related argument that Rule 52(b) does not apply to invalid waivers of rights – like the right to an Article III judge – that require a defendant's personal waiver to be effective. Notably, the Government chooses to ignore Justice Scalia's concurring opinion in *Freytag v. Comm'r*, 501 U.S. 868 (1991). While observing that

---

[22] Fed. R. Crim. P. 51(b).

[23] The Government's argument that petitioner himself should have objected once the magistrate judge announced her title in open court, U.S. Br. 34 n.8, lacks merit. The magistrate judge's mere announcement of her title – without any explanation that petitioner had a right to an Article III judge – is irrelevant, and petitioner's lack of objection cannot be deemed an effective waiver. *See also* Pet. Br. 44-45 n.34.

"in the federal judicial system, the rules generally governing the forfeiture of claims are set forth in Federal Rules of Criminal Procedure 51 and 52(b)," Justice Scalia noted that "[s]ome rights may be forfeited by means short of waiver, . . . but others may not." *Id.* at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment).[24] Significantly, this concurring opinion was joined not only by Justices Kennedy and Souter,[25] but also by Justice O'Connor, the author of *Olano*, the Court's seminal modern decision discussing the plain-error standard in federal criminal appeals.[26] If the Court concludes that (1)

---

[24] Just as the Court in *Schor* (in discussing waiver of the right to an Article III judge) referred to waiver of the right to a criminal jury as an example of an analogous waiver procedure, *see Schor*, 478 U.S. 848-49, Justice Scalia cited the right to a criminal jury as an example of a right that cannot be forfeited "short of [valid] waiver." 501 U.S. at 894 n.2.

[25] Subsequently, Justice Souter was the author of *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) – two other plain-error decisions of the Court on which the Government mistakenly relies. U.S. Br. 35-36 & n.9.

[26] Notably, *Olano* approvingly cited Justice Scalia's opinion in *Freytag* for the proposition that there is a difference between "waiver" and "forfeiture." *See Olano*, 507 U.S. at 733. *Olano*'s discussion of Rule 52(b) also is consistent with Justice Scalia's point. *Olano* observed that Rule 52(b) was intended to adopt the traditional view of error preservation, which states that a right "'may be forfeited in criminal . . . cases by the *failure to make timely assertion of the right*. . . .'" *Olano*, 507 U.S. at 731 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)) (emphasis added). A right that must be affirmatively and personally waived by a defendant – in order to be effectively waived – logically is a

(Continued on following page)

the right to an Article III judge at jury selection is a personal right that requires an affirmative waiver by a defendant for there to be an effective waiver; and (2) petitioner did not waive that right, then, under Justice Scalia's reasoning, the plain-error standard would not apply in petitioner's case. The Court should not treat *Johnson v. United States*, 520 U.S. 461 (1997), as foreclosing this narrow exception to the general applicability of Rule 52(b). *Johnson* held that "structural" errors, as a class, are not exempt from Rule 52(b). *Id.* at 466. However, *Johnson* did not address the separate issue of whether an invalid waiver of a fundamental right requiring a defendant's affirmative, personal waiver is subject to Rule 52(b)'s limitations. Although an invalid waiver of such a personal right qualifies as "structural" error, *see* Pet. Br. 30, it is not the "structural" nature of the right *per se* that is relevant but, instead, the fact that the right, to be effectively waived (and, thus, forfeited), must be affirmatively and personally waived by the defendant.

The Government's reliance on *Vonn* and *Dominguez Benitez* is misplaced. *Vonn* held that defense counsel's failure to object to a district court's noncompliance with Federal Rule of Criminal Procedure 11 is attributable to a defendant for purposes of Rule 52(b). *Vonn*, 535 U.S. at 73 & n.10. However, the Court in

---

right that need not be "asserted" to apply; lack of assertion, thus, cannot be deemed a waiver or forfeiture of such a right.

Vonn only addressed non-constitutional Rule 11 errors and did not retreat from the Court's longstanding requirement that a defendant must *personally waive* fundamental rights at a guilty plea hearing in order for the guilty plea to be valid and, furthermore, that a failure to do so will result in a reversal of the conviction on direct appeal. *See Boykin v. Alabama*, 395 U.S. 238 (1969). Indeed, in *Dominguez Benitez*, the Court subsequently confirmed that an appellate court on direct review must reverse the defendant's conviction when "the record . . . contains no evidence that a defendant knew of the rights he was putatively waiving." 542 U.S. at 84 n.10 (citing *Boykin*).[27] In this regard, it is relevant that the Court in *Schor* cited *Boykin* as an example of the type of waiver procedure to be employed when a defendant waives his "personal" right to an Article III judge. *Schor*, 478 U.S. at 849.

The Government next contends that Justice Scalia's dissenting opinion in *Peretz*, 501 U.S. at 953-55 (cited by petitioner as yet another reason why

---

[27] The Government erroneously contends that this statement of the Court in *Dominguez Benitez* merely "addressed the showing needed to establish an effect on substantial rights under Rule 52(b) for different kinds of violations" and that it did not create an exception to Rule 52(b). U.S. Br. 36 n.9. That is not a fair reading of the Court's description of *Boykin*. In stating that constitutional *Boykin* errors "must be reversed" on appeal, *Dominguez Benitez*, 542 U.S. at 84 n.10, the Court was indicating that the discretionary plain-error standard in Rule 52(b) would not apply.

Rule 52(b) does not apply in this case) has lost its relevance. U.S. Br. 37-38. The Government claims that "[m]ore recent decisions of this Court have . . . refined the standard for plain-error review" and "addressed" Justice Scalia's then-valid concerns by allowing courts to decide whether there was "error" before deciding whether reversal is required. U.S. Br. 38. This argument fails to appreciate that the same situation existed before *Peretz*. *See, e.g., United States v. Young*, 470 U.S. 1, 9-20 (1985) (finding "error" but refusing to reverse under Rule 52(b) because of lack of prejudice). Finally, contrary to the Government's position that the "modern" plain-error standard is unyielding in all situations where an objection was not raised in the court below, the Court in *Nguyen v. United States*, 539 U.S. 69 (2003), refused to apply Rule 52(b)'s strictures to a "fundamental" – as opposed to a merely "technical" – question of "judicial authority" raised for the first time in this Court. *Id.* at 78-81; *see also Roell*, 538 U.S. at 599 (Thomas, J., dissenting, joined by Stevens, Scalia, & Kennedy, JJ.) (discussing a matter not addressed by the majority). Because such a fundamental question exists in this case, the Court should eschew the plain-error standard.[28]

---

[28] Assuming that Rule 52(b) does apply, the Government errs with respect to each prong of *Olano*'s standard. Petitioner has established that there is reversible plain error under that standard. Pet. Br. 58-60.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
H. MICHAEL SOKOLOW
First Assistant Federal
Public Defender
TIMOTHY CROOKS
BRENT E. NEWTON*
Assistant Federal
Public Defenders
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
(713) 718-4600
Brent_Newton@fd.org
Counsel for Petitioner
**Counsel of Record*

73 53075B (2)

37P4P No. 06-11612

Supreme Court, U.S.
FILED
NOV 5 - 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

MARJORIE A. MEYERS
Federal Public Defender
H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
TIMOTHY CROOKS
BRENT E. NEWTON*
Assistant Federal Public Defenders
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
(713) 718-4600
Brent_Newton@fd.org
Counsel for Petitioner
**Counsel of Record*

PAUL D. CLEMENT*
Solicitor General
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, DC 20530-0001
(202) 514-2217
supremectbriefs@usdoj.gov
Counsel for Respondent

Petition For Certiorari Filed May 24, 2007
Certiorari Granted September 25, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Superseding Indictment 3

Excerpt from Pretrial Conference Transcript 8

Excerpt from Jury Selection Transcript 14

Opinion of the United States Court of Appeals for the Fifth Circuit 24

Judgment of the United States Court of Appeals for the Fifth Circuit 34

Order of the Supreme Court of the United States granting certiorari and leave to proceed *in forma pauperis* 35

RELEVANT DOCKET ENTRIES

U.S. v. Homero Gonzalez
District Court Case No. L-04-1763

DOCKET ENTRY NO. 48

Minute Entry for proceedings held before Judge George P. Kazen: FINAL PRETRIAL CONFERENCE as to Homero Gonzalez held on 1/18/2005 the deft atty informs the Court that this case is a trial. Defense atty. Pena also asks for full disclosure from the govt regarding their witnesses and all criminal information felony history regarding witnesses. The govt announces they will call two co-defts as witnesses and that information will be available to the defense atty. The govt also asks for reciprocal discovery from the defense atty. The parties announces [sic] this will be a two-day trial. Pretrial Conference reset to Friday, January 21, 2005 @ 9:30 a.m. for scheduling of trials. Jury selection to be either January 21, 2005 @ 1:30 p.m. of [sic] Monday, January 24, 2005 @ 9:00 a.m. Appearances: Marina G. Marmolejo f/gvt. Oscar J Pena, Sr. f/dft (Court Reporter: Leticia E. Verdin) (Interpreter: B. Zapata/D. Gonzalez) Deft remanded to custody, filed. (bmendoza) (Entered: 1/22/2005)

DOCKET ENTRY NO. 53

Minute Entry for proceedings held before Judge Adriana Arce-Flores: JURY SELECTION as to Homero Gonzalez held on 1/21/2005. Parties consent to proceed before the U.S. Magistrate Judge. General

Jury Instructions and qualifications of panel by court. Voir Dire conducted. 14 juror [sic] selected. Trial will begin Monday, January 4 [sic], 2005 @ 10:00 a.m. Appearances: Marina Marmolejo f/govt; Oscar Pena, Sr and Oscar Pena, Jr f/deft;. (ERO:Sara Medellin) (Interpreter:Alma Adriano),filed.(mmarquez,) (Entered:2/4/2005).

DOCKET ENTRY NO. 56

Minute Entry for proceedings held before Judge Adrian G. Duplantier: First DAY OF JURY TRIAL as to Homero Gonzalez held on 1/24/2005. Jury sworn. Jury trial began. Govt presented evidence. Juror #11 was excused prior to commencing trial. Appearances: Marina M. Garcia f/govt; Oscar O Pena and Oscar J Pena, Sr. f/dft; (Court Reporter: Val Castano) (Interpreter:Ina Pool/Fred Kowalski) Deft remanded to custody, filed. (mmarquez) (Entered: 2/7/2005)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	**L-04-CR-1763 S**
VS.	§	
	§	
HOMERO GONZALEZ	§	

SUPERSEDING INDICTMENT

(Filed Dec. 7, 2004)

THE GRAND JURY CHARGES THAT:

COUNT 1

(Conspiracy to Possess With Intent to Distribute Controlled Substances)

Beginning on or about January of 1997 and continuing up to and including on or about August 31, 2004, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendant, **Homero GONZALEZ** did knowingly and intentionally conspire and agree with others known and unknown to the Grand Jury, to possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one thousand (1000) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Sections 841(b)(1)(A) and 846.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved at least 10,000 kilograms of marihuana, a Schedule I controlled substance; and

2. Defendant Homero Gonzalez was a manager or supervisor of a criminal activity that involved five or more participants and was otherwise extensive.

COUNT 2

(Possession With Intent to Distribute Controlled Substance)

On or about September 10, 1999, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendant, **Homero GONZALEZ** and others, aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 574 kilograms of marihuana, a Schedule I controlled substance.

COUNT 3

(Possession With Intent to Distribute Controlled Substance)

On or about January 22, 2000, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendants, **Homero GONZALEZ** and others, aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 453 kilograms of marihuana, a Schedule I controlled substance.

COUNT 4

(Possession With Intent to Distribute Controlled Substance)

On or about February 1, 2000, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendants, **Romero GONZALEZ** and others, aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 189 kilograms of marihuana, a Schedule I controlled substance.

COUNT 5

(Possession With Intent to Distribute Controlled Substance)

On or about February 11, 2000, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendants, **Romero GONZALEZ and Patrick LEYENDECKER** and others,

aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 609 kilograms of marihuana, a Schedule I controlled substance.

A TRUE BILL

/s/ [Illegible]
FOREPERSON OF THE GRAND JURY

MICHAEL T. SHELBY
UNITED STATES ATTORNEY

/s/ [Illegible]
By: MARINA GARCIA MARMOLEJO
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	*	L-04-1763
	*	LAREDO, TEXAS
VS	*	JANUARY 18, 2005
HOMERO GONZALEZ	*	

TRANSCRIPT OF FINAL
PRETRIAL CONFERENCE
BEFORE THE HONORABLE GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	ASSISTANT UNITED STATES ATTORNEY By: Ms. Marina Garcia Marmolejo 1100 Matamoros, Suite 200 Laredo, Texas 78040 Appearing for the U.S.A.;
For the Defendant:	LAW OFFICES OF OSCAR J. PENA, SR. By: Mr. Oscar J. Pena, Sr. 1720 Matamoros Laredo, Texas 78040 Appearing for the Defendant;
Court Reporter:	Leticia E. Verdin 1300 Victoria Laredo, Texas 78040 (956) 790-1370

Proceedings recorded by mechanical stenography, transcript produced by computer.

[2] THE COURT: Homero Gonzalez with Mr. Pena, 1763.

MR. PENA: Yes, sir. He's present. That will be a trial, Your Honor.

THE COURT: Okay.

MR. PENA: There's still a couple of points that we need to take up with the Court. It won't take long.

THE COURT: Like what?

MR. PENA: It's just a matter of – we have requested all disclosure – full disclosure on any agreements made by the Government with any witness. We need to get that, Your Honor. And, also, Judge, we have requested –

THE COURT: Well, you're going to get that. Whether you get it today or tomorrow or right as they're testifying, we can work that out. But you're definitely going to get that.

MR. PENA: The criminal record of each prosecution witness. We're particularly interested in the codefendants Leyendecker and Lopez. We need to get that, Your Honor.

THE COURT: Well, I'm not sure of a just general criminal record, but whatever might be usable for impeachment, felonies and – I would say,

offhand, [3] if – whatever can be used – like Rule, what is it, 609 felonies or a felony that the Government has – has given him a deal on. But that would come under the other umbrella anyway, some felony that the Government has negotiated down or something.

But do you have any objection to just felony convictions?

MS. MARMOLEJO: No, Your Honor. Your Honor, also, I responded in writing to his request and I've advised him that the extent of the agreement that we have with any witness is a written plea agreement that's a matter of public record. It's an identical plea agreement that was originally made to his client. So they know what agreements we've made already.

THE COURT: How many people are we talking about?

MS. MARMOLEJO: Possible testifying codefendants? Two.

Your Honor, also, we've requested reciprocal discovery. And to this date, I've received no reciprocal discovery from Counsel, so I imagine they don't have any evidence they're going to introduce. Because I've got –

MR. PENA: Well, here's the thing, Judge. She says the alleged conspiracy covers about four years.

[4] THE COURT: Okay.

MR. PENA: And she wants alibi information. How can we do that on that span of time, Judge? It's impossible.

THE COURT: I know, but I don't – correct me if I'm wrong. I don't think you can put on that defense unless you file a notice. So that's your problem, not mine.

MR. PENA: Our position is that what they're saying is not true. Certainly, we can say that –

THE COURT: Well, of course.

MR. PENA: – that he was there.

THE COURT: Of course.

MS. MARMOLEJO: Sure.

THE COURT: Yes, alibi is not –

MR. PENA: We're not going to say that he was –

THE COURT: – alibi was I've got a witness that says on that occasion I was in Bermuda or something.

MR. PENA: No, that's not it.

THE COURT: Okay.

MS. MARMOLEJO: But in addition to that, Judge, just if they have any documents, any photographs, anything that they intend to introduce. We've

already [5] requested from them in writing and we've gotten nothing.

MR. PENA: We have the – copies of his income tax record for approximately five years. They're welcome to look at them. They show income between $18,000.00 per year to $20,000.00 per year. And we may have some photographs of the warehouse.

THE COURT: Well, let's do – Vero, what is the Friday morning schedule?

THE CLERK: The Friday morning? Only two revocations, Your Honor, and that's it.

THE COURT: Why don't you-all come in Friday morning at – at 10:00, and we'll try to go through whatever is left. But now that you're hearing each other, why don't you try to solve as much of that as you can, and then we'll see if there's any loose ends. So I don't keep everybody waiting here. But –

MS. MARMOLEJO: Yes, sir.

THE COURT: Okay. And the trial – what is it, a several year conspiracy? Is that –

MS. MARMOLEJO: Yes, Judge.

THE COURT: How many days?

MS. MARMOLEJO: Two.

THE COURT: Okay. All right. Is that it for you today?

MR. PENA: Yes, sir.

[6] THE COURT: Okay.

MR. PENA: So it's Friday at 10:00 o'clock?

THE COURT: Yeah. Well, come in at 9:30. I – she says we've got a couple of matters, but – because then we're picking a jury – at least a round of jury picking Friday afternoon, and then again Monday morning. But we'll see how all this plays out.

MR. PENA: Yes, sir.

THE COURT: Okay. Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA,	**CASE NO. L-04-CR-1763**
Plaintiff,	**CRIMINAL**
vs.	**Laredo, Texas**
HOMERO GONZALEZ,	**Friday, January 21, 2005**
Defendant.	**(2:07 p.m. to 4:16 p.m.)**

JURY SELECTION

BEFORE THE HONORABLE ADRIANA ARCE-FLORES, UNITED STATES MAGISTRATE COURT JUDGE

EXCEPTIONAL REPORTING SERVICES, INC
15213 CARTAGENA CT
CORPUS CHRISTI, TX 78418
361 949-2988

[2] **APPEARANCES FOR:**

Plaintiff: MARINA GARCIA-MARMOLEJO, ESQ
Assistant United States Attorney
P.O. Box 1179
Laredo, Texas 78042-1179

Defendant: OSCAR PENA, SR, ESQ
OSCAR O PENA, ESQ
P O Box 1324
Laredo, TX 78042-1324

Court Coordinator: Imelda Contreras

Interpreter: Alma Adriano

Court Recorder: Sarah A. Medellin

Transcriber: Andrea Hekimian
Exceptional Reporting Services, Inc.
15213 Cartagena Ct.
Corpus Christi, Texas 78418
361 949-2988

[3] **Laredo, Texas; Friday, January 21, 2005; 2:07 p.m.**

(Official Interpreter utilized for translation)

(Call to Order)

THE COURT: If I could have the attorneys approach the bench? Right there is fine. Right there is fine so we can just get everything on the record. Thank you. Right there by the mike. Thanks. We're here in L-04-CR-1763, *The United States of America versus Romero Gonzalez.* Presiding judge is United States Magistrate Judge, Adrian Arce-Flores.

Present for the government?

MS. GARCIA-MARMOLEJO: Marina Garcia-Marmolejo for the government.

MR. OSCAR PENA SR.: Oscar Pena, Senior and –

MR. OSCAR O. PENA: Oscar O. Pena.

THE COURT: I need to ask the parties at this time if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case.

MS. GARCIA-MARMOLEJO: Yes, we are, your Honor.

MR. OSCAR PENA SR.: Yes, your Honor, we are.

THE COURT: Thank you. Then we'll proceed in just a moment.

MS. GARCIA-MARMOLEJO: Thank you, your Honor.

THE COURT: The parties have agreed through consent that this Court will be assisting through the process of jury [4] selection. Is the defendant present?

MR. OSCAR PENA SR.: He is present, your Honor.

THE COURT: Mr. Pena, does the defendant need the assistance of an interpreter at this time, sir?

MR. OSCAR PENA SR.: Yes he does, your Honor.

THE COURT: My understanding is that before these jurors have been seated this afternoon they have already been pre-qualified. That means that the issue of eligibility and excuses and/or exemptions

have already been addressed with the district court; however, I'm sure that there are some issues that have not been addressed in reference to the time. And I will explain that to them briefly but you all can touch up on that as well.

MS. GARCIA-MARMOLEJO: That's fine, Judge.

MR. OSCAR PENA SR.: Thank you, ma'am.

THE COURT: Okay. You know what I will have my secretary –

MS. GARCIA-MARMOLEJO: Yes. Thank you.

(Pause)

THE COURT: We're going to proceed this afternoon and I'd like to introduce myself at this time; I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process. I would like to briefly explain that the process is a necessary but sometimes tedious one.

[5] The Constitution provides that every individual accused of a crime be afforded the right to a trial by jury of his or her peers. Today you are those peers. This is an important right and the history of our country is founded on rights such as these. Therefore, in order for the goals of fairness and justice to be accomplished, it is important for citizens of a community to serve on the jury when they are called. We all

thank you for doing your civic duty. And we'll proceed as efficiently as possible but not at the expense of the judicial process.

Now I will – we are trying to verify generally as the court I go through all necessary qualifications for you as members of the jury panel. My understanding is that you had been called in to the federal court and were already pre-qualified – it sounds like a – a home – you were pre-qualified before you came to my court. It means that you went downstairs and had already spoken to the clerk's office and basically they went through the most important part before you can even get here, meaning that they asked you if you were over 18, if you can read and write English, if you spoke English, if you were not mentally or physically incapable of rendering jury service or if you do not have any pending federal charges. I'm going to pick someone out of this group. Was that done already?

ALL JURORS: Yes.

[6] **THE COURT:** Okay. Thank you. Now I will tell you this because we're going to begin with voir dire. And generally, I will give each side 15 to 20 minutes at the most – now sometimes they go over a little over but these – we have two very experienced attorneys on both sides and they've gone through the jury selection process and voir dire more – more times than I can count on my hands, so fortunately for all of us here, we have two excellent sets of attorneys assisting the Court today.

The next step is this. We are going to go through what they call "Voir Dire." And "Voir Dire" it's French and it means to speak the truth. Now the process and the purpose of voir dire is very important to the judicial system especially to the jury selection process. It enables the Court to determine whether or not there are any prospective jurors that should be excused and it also enables the attorney for both sides, both the government and for the defendant and the parties to allow them to exercise their individual judgment with respect to any preemptory challenges and/strikes used when there is really no reason needed.

For both parties I'm going to introduce present for the government is Marina Garcia-Marmolejo. And she will introduce her case agent. Thank you, Ms. Garcia.

MS. GARCIA-MARMOLEJO: The case agent is Robert Webb and he is with the FBI here in Laredo, Texas.

[7] **THE COURT:** Thank you, Ms. Garcia.

MS. GARCIA-MARMOLEJO: Thank you.

THE COURT: Present for the defendant, Mr. Gonzalez is –

MR. OSCAR PENA SR.: Oscar Pena, Senior. And this young man is my grandson, his name is Oscar O. Pena.

THE COURT: Thank you, Mr. Pena. Now for purposes of this proceeding I'll remind the attorneys for the government and the attorneys for the defendant – I forgot to tell you this earlier. It'll be seven strikes for the government and 11 for the defense. The rule permits six and ten, but I'm going to go ahead and ask that there be 12, the jury seated with two alternates.

THE COURT: Ms. Garcia or Mr. Pena, do you know if Judge Cason asked for more than two alternates in this case?

MS. GARCIA-MARMOLEJO: No, your Honor, he didn't.

THE COURT: Two is fine?

MS. GARCIA-MARMOLEJO: Yes, Judge.

THE COURT: Then we'll have 14 seated jurors. Some of you may have already gone through the process of jury selection and in a few moments I stop talking and I let the attorneys handle the voir dire and that's what's going to happen right now. I am going to – I just briefly explained to you how the process works. The one that's going to go first is the attorney for the government, that's Ms. Garcia-Marmolejo, [8] and then after she speaks to you because she is going to be speaking to you directly, after she speaks to you then it'll be the attorneys for the defense and they will speak with you as well. After that is done then they will make their selection, so we'll try to be as efficient as possible.

I will ask you this. Those of you that have your number whenever you address either side, either the government side or the defense side, you do need to raise up your number so that we can make note of who has been addressing the court and/or the attorneys. This case is scheduled to proceed Monday – my days are off – what days are –

MS. GARCIA-MARMOLEJO: I'm sorry?

THE COURT: Monday to what day, next Monday?

MS. GARCIA-MARMOLEJO: Yes, the 24th.

THE COURT: The 24th. Monday the 24th and is scheduled to start at 1:30 p.m. It is set to go through until Wednesday or Thursday, okay? In a few moments the Court will address any concerns about those specific time lines. Now there are some issues that you may not want to address from your seat. There are some issues that you feel that are too sensitive to be stated out loud. When that occurs the Court will ask that you go to the front where there's like a little door. The court security officer will assist the Court and you will be brought forth to the Court so it won't be like using a microphone or anything. It'll be a private conversation with [9] the Court.

Are you ready to proceed at this time, Ms. Garcia?

MS. GARCIA-MARMOLEJO: Yes, your Honor, we are.

THE COURT: You may proceed and each side will be permitted 15 to 20 minutes.

MS. GARCIA-MARMOLEJO: Okay, Judge. Will you, if I'm getting very close to my time will you let me know?

THE COURT: I'll ring the bell.

MS. GARCIA-MARMOLEJO: Thank you. Good afternoon, ladies and gentlemen. I apologize because of the way the courtroom is set up I'm going to be giving my back to some of you at some point in time, so if you raise your hand and I don't know notice just make sure you get my attention.

We have a brief amount of time to talk to you this afternoon. As the Court indicated my name is Marina Garcia-Marmolejo and I'm an Assistant U.S. Attorney. I represent the people and the United States in the case. This case deals with several charges but it is a drug case. It's a conspiracy involving more than 1,000 kilograms of marijuana. And of course if you're selected as jurors you'll hear about the individual facts in this particular case.

Now as the Court indicated right now all of you took an oath and your oath is just simply to tell us the truth. But if you're selected as jurors, you're going to be taking an oath to follow the law. The law as the judge explains it to you, so [10] this is a really important time for us to get to know each other and for you to tell me if you are going to be able to follow the law

as it's been passed by congress and as the Court is going to explain to you.

I guess one of the first things is this case will last about two days, so if we begin Monday at around 1:30, I guess we'll be done by Wednesday afternoon. Does anybody have any previous commitments; a doctor's appointment or perhaps you're scheduled to be out of town that would prevent you from being in court and serving on this jury? Is there anybody here in that predicament? Yes, what is your number, ma'am?

JUROR NUMBER 20: Twenty.

THE COURT: Number 20, do you have a scheduled –

JUROR NUMBER 20: I have a special ed. child; he's autistic, he's seven and gets out of school at 2:30 and there is no after-school daycare that could take him. I tried but they didn't want –

MS. GARCIA-MARMOLEJO: No, no, that's fine, ma'am. Your Honor, at that this time we would ask that Number 20 be excused.

THE COURT: I think she tried to be excused earlier. And we just called – I don't know how they did not get to you Ms. – is it –

JUROR NUMBER 20: Well I did talk to them but the jury clerk just said –

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40723

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HOMERO GONZALEZ,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 30, 2007)

Before REAVLEY, JOLLY and BENAVIDES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case requires us to consider the conditions under which jury selection may be permissibly delegated to a magistrate judge. Homero Gonzalez was tried and convicted by jury. On appeal, he claims that the delegation of voir dire to a magistrate judge without his express personal assent was erroneous. We disagree and affirm.

I.

A brief description of the procedural events leading up to trial provides a background for an understanding of the case. Gonzalez and his co-defendant were charged in a multi-count indictment with several drug-related offenses. Gonzalez pled not guilty and elected to be tried by a jury. Prior to jury selection, Gonzalez appeared in court six times, twice before Magistrate Judge Arce-Flores, who presided over the initial appearance and the arraignment and bond hearing, and four times before District Judge Kazen for pretrial conferences. At no time during the conferences did District Judge Kazen propose delegating jury selection to Magistrate Judge Arce-Flores.

On January 21, 2005, jury selection was conducted before Magistrate Judge Arce-Flores. At the outset of the process, Judge Arce-Flores said: "I need to ask the parties at this time if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." The prosecutor responded: "Yes, we are, Your Honor." Gonzalez's attorney, Oscar Pena, also responded: "Yes, your Honor, we are." Magistrate Judge Arce-Flores then stated: "The parties have agreed through consent that this Court will be assisting through the process of jury selection."

Judge Arce-Flores then asked whether Gonzalez was present, and whether he required a translator to which Pena replied affirmatively. Judge Arce-Flores then said, "We're going to proceed this afternoon and

I'd like to introduce myself at this time; I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process." The magistrate judge never asked Gonzalez directly whether he consented to having a magistrate judge perform jury selection. The record does not contain any kind of written consent.

The record shows that voir dire proceeded without incident. The magistrate provided a thorough explanation of the process to the parties and the venire members, and permitted both sides to make statements and ask their own series of questions. Gonzalez did not make any objections as to how jury selection was conducted. Gonzalez proceeded to trial before District Judge Duplantier and was found guilty on all counts. Gonzalez timely appealed from the judgment of conviction entered by the district court on April 29, 2005.

II.

On appeal, Gonzalez argues that because he did not consent personally to the district court's delegation of jury selection to a magistrate judge, his case should be remanded for a new trial. Because Gonzalez raised this issue for the first time on appeal, we review for plain error. This appears to be the practice in the other circuits that have considered this type of claim. *See United States v. Rivera-Sola,* 713 F.2d 866, 874 (1st Cir. 1983); *United States v. Jones,* 938 F.2d 737, 744 (7th Cir. 1991); *United States v. Maragh,*

174 F.3d 1202, 1204 (11th Cir.), *opinion supplemented on reh'g*, 189 F.3d 1315, 1316 (11th Cir. 1999). Under the plain error standard, Gonzalez must demonstrate clear or obvious error that affected his substantial rights. *United States v. Fernandez-Cusco*, 447 F.3d 382, 385 (5th Cir. 2006).

A.

Under the Federal Magistrates Act, 28 U.S.C. § 636(b)(3), a federal district court may delegate certain pretrial Article III duties to a magistrate judge. The Supreme Court has twice considered the conditions under which voir dire permissibly may be delegated. In *Gomez v. United States*, 490 U.S. 858 (1989), the Supreme Court determined that permitting a magistrate to conduct voir dire over the express objection of the defendant was not a permissible delegation. *Id.* at 872. Subsequently, however, in *Peretz v. United States*, 501 U.S. 923 (1991), the Court held that under some circumstances, when the defendant does not object, voir dire is one of the Article III duties that may be delegated. *Id.* at 940.

Peretz was charged with importing heroin and elected to be tried by jury. *Id.* at 925. At a pretrial conference at which both he and his counsel were present, the district court asked if there was any objection to having a magistrate conduct jury selection. *Id.* Peretz's counsel said: "I would love the opportunity." Immediately before jury selection, "the Magistrate asked for, and received, assurances from

counsel for [Peretz] . . . that she had [his client's] consent to proceed with jury selection." *Id.* Peretz was tried and convicted. On appeal, he "contended that it was error to assign the jury selection to the Magistrate." *Id.* at 925. The Court granted certiorari to consider whether the delegation of voir dire with the defendant's consent exceeds the scope of 28 U.S.C. § 636 or is inconsistent with Article III. *Id.* at 927.[1]

The Court first considered whether permitting delegation of voir dire was consistent with the purposes of the Federal Magistrate Act. Noting that "with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials," and that "these duties are comparable in responsibility and importance to presiding over voir dire at a felony trial," the Court determined that the Federal Magistrate Act's "additional duties" clause "permits a magistrate to supervise jury selection in a felony trial provided the parties consent." *Id.* at 933. The Court then considered whether such a delegation is constitutional if done with the parties' consent and held that it is, relying on its earlier precedent holding that "[t]he most basic rights of criminal defendants are subject

---

[1] The Court also granted certiorari to consider whether "the conduct of petitioner and his attorney constitute[d] a waiver of the right to raise [the erroneous delegation] on appeal," *id.* (internal quotation marks and citation omitted), but ultimately did not reach this issue. *Id.* at 940.

to waiver." *Id.* at 936.[2] The Court concluded by noting that "[e]ven assuming that a litigant may not waive structural protections provided by Article III . . . no such structural protections are implicated by the procedure followed in this case." *Id.* at 937 (internal citation omitted).

Peretz did not clearly address whether the magistrate judge must obtain the defendant's affirmative consent before conducting voir dire and, if so, whether the defendant must consent personally or whether counsel's consent is binding. The ambiguity in *Peretz* has led to a circuit split on what demonstration of consent is required to delegate jury selection. This appears to be a question of first impression for our court.

B.

Gonzalez relies heavily on the Eleventh Circuit decision in *United States v. Maragh,* 174 F.3d 1202 (11th Cir. 1999), which presented a factual scenario

---

[2] The Court cites, *inter alia, United States v. Gagnon,* 470 U.S. 522, 528 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine v. United States,* 362 U.S. 610, 619 (1960) (failure to object to closing of courtroom waives right to public trial); *Segurola v. United States,* 275 U.S. 106, 111 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Bascaro,* 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States,* 472 U.S. 1017 (1985).

similar to this case. Prior to conducting jury selection, the magistrate judge said, "I am here to select a jury and everybody has agreed to me selecting the jury for Judge Graham. Is that correct?" Both the defense attorney and the Government attorney agreed. *Id.* at 1204. A divided panel found that it was "unclear whether counsel's response to the magistrate judge's question represented the defendant's consent" and remanded to the district court for a factual finding on this question.[3] *Id.* at 1205. The court then held "prospectively, under [its] supervisory powers . . . , that henceforth it will be error for a magistrate to conduct voir dire in a felony case unless the record clearly shows that the defendant has knowingly consented to such procedure." *Id.* at 1207.

The Eleventh Circuit appears to be alone in having reached the conclusion that the defendant's personal consent is required for the delegation of jury selection to be constitutionally valid. The First Circuit, in contrast, has held that the delegation of voir dire is permissible unless the defendant objects. Failure to object constitutes a waiver. *United States v. Desir,* 273 F.3d 39, 44 (1st Cir. 2001). The Seventh Circuit has held that absent an objection, it is not plain error for a magistrate to conduct jury selection in a felony trial. *United States v. Jones,* 938 F.2d 737,

---

[3] The dissenting judge would not have remanded for an evidentiary hearing, but instead would have held that the defendant's consent must be obtained on the record before the magistrate may conduct voir dire. *Id.* at 1207.

744 (7th Cir. 1991). The Ninth Circuit has not directly addressed jury selection but, relying on *Peretz,* has held that some form of affirmative consent is required before a magistrate judge may poll the jury. *United States v. Gomez-Lepe,* 207 F.3d 623, 631 (9th Cir. 2000). Similarly, the Eighth Circuit has found that some form of consent is required before a magistrate judge may supervise jury deliberations. *Harris v. Folk Construction Co.,* 138 F.3d 365, 369-70 (8th Cir. 1998).[4]

C.

Given the unsettled state of the law interpreting *Peretz,* and given that this court has never decided what level of consent is required (if any), it is difficult to see how Gonzalez could demonstrate that the delegation of jury selection constituted a plain error. Even if, however, we were to review under a less stringent standard, *Peretz* still provides little support for the position Gonzalez adopts. The fact pattern in *Peretz,* in which the delegation was found to be permissible, is almost identical to that in the instant case. Furthermore, there is no indication that the Court found the absence of specific consent by the defendant to be a dispositive, or even relevant consideration. No court other than the *Maragh* panel of the

[4] Neither *Harris* nor *Gomez-Lepe* discuss whether the required consent must be given by the defendant personally or whether consent given through counsel would be sufficient.

Eleventh Circuit has reached the outcome Gonzalez proposes, and the debate among the other circuits appears to turn on whether affirmative consent is required at all, not on what form this consent must take.

Although certain rights are so fundamental that they must be waived personally by the defendant, Gonzalez provides no support for his contention that the right to have an Article III judge conduct voir dire is among them. "What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *New York v. Hill,* 528 U.S. 110, 114 (2000) (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993)). As the Government points out, the defendant does not, by waiving his right to have an Article III judge conduct voir dire, waive his right to judicial review of those proceedings. The nature of the right given up is therefore limited, particularly as compared to the other rights that we have held may be waived via counsel. *See, e.g., United States v. Spiegel,* 604 F.2d 961, 964-66 (5th Cir. 1979) (counsel's waiver of a defendant's right to 12-person jury was binding on defendant); *United States v. Muhammad,* 165 F.3d 327, 332-33 (5th Cir. 1999) (counsel's waiver of defendant's right to have an Article III judge preside over a civil commitment hearing was binding on defendant); *Winters v. Cook,* 489 F.2d 174, 179 (5th Cir. 1973) (en

banc) (defendant bound by attorney's decision to waive right to "constitutionally composed" grand jury in murder indictment). In sum, there is no error here; the right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40723

D.C. Docket No. 5:04-CR-1763-1

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HOMERO GONZALEZ

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas, Laredo.

Before REAVLEY, JOLLY, and BENAVIDES, Circuit Judges.

JUDGMENT

(Filed Mar. 30, 2007)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

U.S. Supreme Court

U.S. v. Homero Gonzalez, No. 06-11612

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted limited to the following Questions: "1) Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire? 2) Did the court of appeals err when it reviewed petitioner's objection for plain error?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

---

73 53070a (1)
80 pgs

No. 06-11612

Supreme Court, U.S.
FILED
NOV 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
TIMOTHY CROOKS
BRENT E. NEWTON*
Assistant Federal Public Defenders
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
(713) 718-4600
Brent_Newton@fd.org
Counsel for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over *voir dire*?

II. Did the Court of Appeals err when it reviewed petitioner's objection for plain error?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE COURT SHOULD INTERPRET 28 U.S.C. § 636(b)(3) TO REQUIRE A FEDERAL CRIMINAL DEFENDANT'S EXPLICIT AND PERSONAL WAIVER OF THE RIGHT TO AN ARTICLE III JUDGE IN ORDER FOR A MAGISTRATE JUDGE TO CONDUCT FELONY JURY SELECTION 10

A. Introduction 10

B. Whether A Magistrate Judge May Conduct Felony Jury Selection Without The Express, Personal Consent Of The Defendant Is A Serious Constitutional Question 13

1. Article III Judges Occupy A Place Of Historic Importance Within Our Constitutional System 13

TABLE OF CONTENTS – Continued

Page

2. Federal Magistrate Judges Lack The Institutional Independence Of Article III Judges 15

3. Having An Independent Judge Conduct Felony Jury Selection Is A Core Article III Concern 18

4. A Constitutionally Effective Waiver Of The Right To An Article III Judge At Felony Jury Selection Requires A Federal Defendant's Express And Personal Consent To Delegation To A Magistrate Judge 21

a. A Defendant's Mere Silence Does Not Amount To "Consent" Or "Waiver" 22

b. Defense Counsel Cannot Unilaterally Waive A Defendant's "Personal" and "Basic" Right To An Article III Judge 25

c. The Constitutional Avoidance Doctrine Requires The Court To Avoid The Serious Constitutional Question Raised In This Case 31

C. The "Additional Duties" Clause of the FMA Should Be Interpreted *In Pari Materia* With 18 U.S.C. § 3401(b) 32

TABLE OF CONTENTS – Continued

Page

D. The Requirement Of Explicit, Personal Consent By A Defendant Promotes, Rather Than Impairs, Judicial Efficiency 39

E. Alternatively, An Effective Waiver At Least Requires The Record To Reflect The Defendant's Knowing And Voluntary Acquiescence In His Attorney's Explicit Waiver Of The Right To An Article III Judge 41

II. THE COURT OF APPEALS ERRED BY APPLYING THE PLAIN-ERROR STANDARD TO PETITIONER'S CLAIM THAT THE MAGISTRATE JUDGE LACKED AUTHORITY TO CONDUCT JURY SELECTION 45

A. Because Mr. Gonzalez Did Not Have The Opportunity To Object To His Attorney's Purported Waiver Of His Right To An Article III Judge, Rule 52(b) Does Not Apply 46

B. The Plain-Error Standard Cannot Be Applied To A Claimed Violation Of A Basic Right That Must Be Personally Waived By A Criminal Defendant When The Record Does Not Reflect An Adequate Waiver 49

TABLE OF CONTENTS – Continued

Page

C. Applying The Plain-Error Standard Would Be Untenable Because The Very Nature of Mr. Gonzalez's Claim Necessarily Means It Must Be Raised For The First Time On Appeal 51

D. Application Of Rule 52(b) As A Procedural Bar To Mr. Gonzalez's Claim Would Serve No Legitimate Governmental Interest And Anomalously Would Impose Stricter Error-Preservation Requirements On Federal Defendants Than Those For Similarly Situated State Defendants 54

E. Even If The Court Were To Apply The Plain-Error Standard, Mr. Gonzalez Would Still Be Entitled To Reversal Of His Conviction 58

CONCLUSION 60

APPENDIX

U.S. Const. art. III, § 1 ..... A1

28 U.S.C. § 636(a)-(c) A1

Fed. R. Crim. P. 51(b) A6

Fed. R. Crim. P. 52(b) A6

TABLE OF AUTHORITIES

Page

CASES

Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942) 7

Ake v. Oklahoma, 470 U.S. 68 (1985) 57

Argersinger v. Hamlin, 407 U.S. 25 (1972) 36

Arizona v. Fulminante, 499 U.S. 279 (1991) ... 29, 30, 59

Barker v. Wingo, 407 U.S. 514 (1972) 31, 40

Blakely v. Washington, 542 U.S. 296 (2004) 18

Boykin v. Alabama, 395 U.S. 238 (1969) 29, 50, 57

Brecht v. Abrahamson, 507 U.S. 619 (1993) 33

Brookhart v. Janis, 384 U.S. 1 (1966) 27, 30, 57

Carnley v. Cochran, 369 U.S. 506 (1962) 36

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 53

City of Rancho Palos Verdes, California v. Abrams, 544 U.S. 113 (2005) 35

College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board, 527 U.S. 666 (1999) 31, 44

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) ..... *passim*

Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) 27

Crowell v. Benson, 285 U.S. 22 (1932) 32

TABLE OF AUTHORITIES – Continued

Page

DelCostello v. International Broth. of Teamsters, 462 U.S. 151 (1983) 38

Dickerson v. United States, 530 U.S. 428 (2000) 38

Dixon v. United States, 126 S. Ct. 2437 (2006) 34

Doughty v. State, 470 N.E.2d 69 (Ind. 1984) 27, 28, 50, 51

Duncan v. Louisiana, 391 U.S. 145 (1968) 18, 28, 29, 51

Faretta v. California, 422 U.S. 806 (1975) 50

Florida v. Nixon, 543 U.S. 175 (2004) 27

Freytag v. Comm'r, 501 U.S. 868 (1991) 47, 49, 50, 52, 54

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984) 17

Gideon v. Wainwright, 372 U.S. 335 (1963) 29

Gomez v. United States, 490 U.S. 858 (1989) .... *passim*

Grace v. Collector of Customs, 79 F. 315 (9th Cir. 1897) 37

Hernandez v. New York, 500 U.S. 352 (1991) 19

James v. Kentucky, 466 U.S. 341 (1984) 55

Johnson v. Zerbst, 304 U.S. 458 (1938) 27, 31, 36, 50

Kaufman v. United States, 394 U.S. 217 (1969), *overruled on other grounds, Stone v. Powell*, 428 U.S. 465 (1976) 55

Lee v. Kemna, 534 U.S. 362 (2002) 55

TABLE OF AUTHORITIES – Continued

Page

Miles v. Apex Marine Corp., 498 U.S. 19 (1990)..... 33

Miller-El v. Dretke, 545 U.S. 231 (2004) 19

Morgan v. Illinois, 504 U.S. 719 (1992)..... 19

New York v. Hill, 528 U.S. 110 (2000) ..... *passim*

Nguyen v. United States, 539 U.S. 69 (2003) 48

North Carolina v. Butler, 441 U.S. 369 (1979)..... 24

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)..... 15, 17, 26

Patton v. United States, 281 U.S. 276 (1930), *overruled on other grounds, Williams v. Florida*, 399 U.S. 78 (1970)..... *passim*

Peretz v. United States, 498 U.S. 1066 (1991)..... 12

Peretz v. United States, 501 U.S. 923 (1991)..... *passim*

Ristaino v. Ross, 424 U.S. 589 (1976)..... 19

Roell v. Withrow, 538 U.S. 580 (2003)..... 42, 43, 44, 48

Taylor v. Illinois, 484 U.S. 400 (1988)..... *passim*

Thomas v. Arn, 474 U.S. 140 (1985)..... 15

Tumey v. Ohio, 273 U.S. 510 (1927)..... 30

United States v. Barnett, 398 F.3d 516 (6th Cir. 2005)..... 59

United States v. Cotton, 535 U.S. 625 (2002)..... 59

United States v. Dominguez Benitez, 542 U.S. 74 (2004)..... 50

United States v. Erskine, 355 F.3d 1161 (9th Cir. 2004)..... 49

TABLE OF AUTHORITIES – Continued

Page

United States v. Gamba, 483 F.3d 942 (9th Cir. 2007), *cert. pet. filed* (Aug. 17, 2007) (No. 07-6504) 41

United States v. Hatter, 532 U.S. 557 (2001) 13, 14, 15, 26

United States v. Hayes, 218 F.3d 615 (6th Cir. 2000) 55

United States v. Jackson, 390 U.S. 570 (1968) 34

United States v. Johnston, 258 F.3d 361 (5th Cir. 2001) 15, 43

United States v. Leja, 448 F.3d 86 (1st Cir. 2006) 42

United States v. Luin-Cabarroca, 2005 WL 2840638 (S.D. Tex. – Laredo Div. Oct. 28, 2005) 41

United States v. Macklin, 523 F.2d 193 (2d Cir. 1975) 28

United States v. Maragh, 174 F.3d 1202 (11th Cir.), *supp. op. on reh'g*, 189 F.3d 1315 (11th Cir. 1999) 38

United States v. Mendez, 102 F.3d 126 (5th Cir. 1996) 42

United States v. Nelson, 277 F.3d 164 (2d Cir. 2002) 30

United States v. Olano, 507 U.S. 725 (1993) ..... *passim*

United States v. Page, 661 F.2d 1080 (5th Cir. 1981) 42

TABLE OF AUTHORITIES – Continued

Page

United States v. Recio, 371 F.3d 1093 (9th Cir. 2004) 59

United States v. Schray, 383 F.3d 430 (6th Cir. 2004) 46

United States v. Soveranes-Ortiz, 2005 WL 2840648 (S.D. Tex. – Laredo Div. Oct. 13, 2005) 41

United States v. Vonn, 535 U.S. 55 (2002) 50

United States v. Wright, 516 F. Supp. 1113 (E.D. Pa. 1981) 44

Uttecht v. Brown, 127 S. Ct. 2218 (2007) 19

Wachovia Bank v. Schmidt, 546 U.S. 303 (2006) 37

Wilkerson v. Whitley, 28 F.3d 498 (5th Cir. 1994) (*en banc*) 18

Zadvydas v. Davis, 533 U.S. 678 (2001) 33

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III ..... *passim*

U.S. Const. art. III, § 1 ..... 1, 13, 14, 15, 43

U.S. Const. art. III, § 2, cl. 3 18

U.S. Const. amend. VI 56

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

18 U.S.C. § 3401 ..... 35, 36
18 U.S.C. § 3401(a) 34
18 U.S.C. § 3401(b) ..... *passim*
28 U.S.C. § 631(b)(5) 16
28 U.S.C. § 631(e) 15
28 U.S.C. § 631(i) 15
28 U.S.C. § 636 ..... 1, 12, 36
28 U.S.C. § 636(a)(3) 36, 38
28 U.S.C. § 636(b)(3) ..... *passim*
28 U.S.C. § 636(c) 38
28 U.S.C. § 636(c)(1) 43
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1257 55
28 U.S.C. § 2255 15
Fed. R. Crim. P. 2 55
Fed. R. Crim. P. 7(b) 40
Fed. R. Crim. P. 11 50
Fed. R. Crim. P. 23(a)(1) 40
Fed. R. Crim. P. 51(b) 1, 9, 46, 48, 49
Fed. R. Crim. P. 52(b) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032 (1985) 16

Alexander Hamilton, *Federalist No. 78* 14

Alexander Hamilton, *Federalist No. 79* 14

Alexander Hamilton, *Federalist No. 83* 18

Judicial Conference of the United States, *Selection, Appointment, and Reappointment of United States Magistrate Judges* (2001) 16

Wayne R. LaFave *et al.*, 3 CRIMINAL PROCEDURE 607 (2d ed. 1999) 39

Norman J. Singer, 2B SUTHERLAND ON STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000) 36

1 A. de Tocqueville, DEMOCRACY IN AMERICA 287 (H. Reeve transl. 1900) 19

Stephen Zamora *et al.*, MEXICAN LAW 193-94, 204 (Oxford 2004) 45

H.R. Rep. No. 287, 96th Cong., 1st Sess., 17-18 (1979) 36

THE DECLARATION OF INDEPENDENCE ¶ 11 14

In the Matter of Jurisdiction and Procedure For Duties Assigned To United States Magistrate Judges In This District, General Order No. 2002-13 (S.D. Tex. Dec. 13. 2002) 5

TABLE OF AUTHORITIES – Continued

Page

Judge Hopes For A Hearing: Clock Is Ticking, But Fresno-Based Magistrate May Slide Through Confirmation, FRESNO BEE, Sept. 2, 2006, 2006 WLNR 15392459 16

Magistrate Judges Demystified: Once Under-appreciated, U.S. Magistrate Judges Finally Get Some Respect, TEXAS LAWYER, Jan. 7, 2002 16

OPINION BELOW

The opinion of the Court of Appeals, J.A. 24-33, is reported at 483 F.3d 390.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 2007. The petition for a writ of certiorari was filed on May 24, 2007, and granted on September 25, 2007. J.A. 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Questions Presented implicate Article III, § 1, of the United States Constitution, the Federal Magistrates Act (28 U.S.C. § 636), and Federal Rules of Criminal Procedure 51(b) and 52(b). The pertinent parts of those provisions are set forth in the Appendix.

STATEMENT OF THE CASE

In 2004, a federal grand jury in Laredo, Texas, returned a superseding indictment charging the petitioner, Homero Gonzalez, with conspiracy and substantive drug-trafficking offenses. Mr. Gonzalez, who was represented by counsel, pleaded not guilty, and his case was set for a jury trial.

At the time of trial, Mr. Gonzalez was a 45-year-old Mexican citizen who resided in the United States as a permanent resident alien. *See* Presentence Report ("PSR") ¶ 58.[1] His criminal record consisted of two state misdemeanor convictions (for driving while intoxicated and theft). PSR ¶¶ 54-55. His formal education was limited to secondary school in Mexico, PSR ¶ 63, and his employment record consisted of various types of manual labor. PSR ¶ 64.

The initial court proceedings in this case, including the detention hearing and arraignment, were before United States Magistrate Judge Adriana Arce-Flores. R. 116, 131. Thereafter, there were four pretrial conferences before United States District Judge George P. Kazen. R. 276-84; R. 272-73; R. 227-33; R. 235-40. Because Mr. Gonzalez did not speak fluent English,[2] he required the assistance of an official court interpreter to translate the English proceedings into Spanish. *See, e.g.*, R. 133, 152.[3]

---

[1] The record on appeal ("R.") is cited according to the pagination appearing on the lower right-hand corner of each document. The presentence report ("PSR") is cited by paragraph number. The Joint Appendix ("J.A.") is cited by its internal pagination.

[2] In addition to using an official court interpreter throughout the district court proceedings, Mr. Gonzalez required the assistance of a Spanish interpreter when he was interrogated by law enforcement officers. R. 459-60. During his testimony at trial, Mr. Gonzalez stated – in Spanish, using an interpreter – that he understood "some" English but "not very much." R. 567.

[3] In accordance with the common practice in federal court in Laredo, the interpreter spoke to Mr. Gonzalez via an audio

(Continued on following page)

At no point during any of the pretrial conferences was Mr. Gonzalez or his defense counsel ever informed that a magistrate judge would conduct jury selection. The only mention of jury selection came at the end of the last pretrial conference, when Judge Kazen stated that "we're picking a jury" the following Friday or Monday, although he made no reference to a magistrate judge's participation in jury selection. R. 240.

At jury selection, Magistrate Judge Arce-Flores appeared as the sole presiding judge. At the outset, she directed "the attorneys [to] approach the bench." R. 151 (J.A. 15). The record is clear that the prosecutor and defense counsel physically approached the bench and engaged in a discussion with the magistrate judge. R. 151 (J.A. 15-16). The magistrate judge asked the attorneys to stand near the microphone at the bench being used to record the proceedings. *Id.*; *see also* R. 226 (certification that the *voir dire* proceedings were transcribed "from the electronic sound recording of the proceedings").

At the bench, the following verbal exchange occurred:

> THE COURT: I need to ask the parties at this time if they are going to consent to having th[is] United States Magistrate Judge proceed in assisting in the jury selection of this case.

---

device; Mr. Gonzalez heard the translation through earphones. *See, e.g.*, R. 292.

> MS. GARCIA-MARMOLEJO [the prosecutor]: Yes, we are, your Honor.
>
> MR. OSCAR PENA SR.: Yes, your Honor, we are.
>
> THE COURT: Thank you. Then we'll proceed in a just a moment.
>
> MS. GARCIA-MARMOLEJO: Thank you, your Honor.
>
> THE COURT: The parties have agreed through consent that this Court will be assisting through the process of jury selection. Is the defendant present?
>
> MR. OSCAR PENA SR.: He is present, your Honor.
>
> THE COURT: Mr. Pena, does the defendant need the assistance of an interpreter at this time, sir?
>
> MR. OSCAR PENA SR.: Yes he does, your Honor.

R. 151-52 (J.A. 16).

It appears from the record that, after this discussion at the bench was concluded, the attorneys returned to their tables, and the magistrate judge then addressed the members of the venire in open court. *See* R. 152 (J.A. 17) (transcript notes that a "pause" occurred after the bench conference and that, immediately thereafter, the magistrate judge addressed the members of the venire). The magistrate judge

conducted the entire *voir dire* process, including the actual empaneling of the petit jury. R. 220.

The magistrate judge never asked Mr. Gonzalez whether he personally consented to have her conduct jury selection. She never mentioned to him that his counsel had consented at the bench. And, as the Court of Appeals recognized, Mr. Gonzalez never executed any type of written consent or waiver. J.A. 26.

No Article III judge played a role in the jury selection process.[4] Although the magistrate judge informed the attorneys that "the issue of eligibility and excuses and/or exemptions ha[s] already been addressed with the district court" before *voir dire*, R. 152 (J.A. 16-17), she actually meant that prospective jurors "had already spoken to the clerk's office and basically . . . went through" exemptions and

---

[4] No order of referral to Magistrate Judge Arce-Flores – from a federal district judge – appears in the record. Nor does there appear to be a "standing order" issued by a federal district judge that referred jury selection to Magistrate Judge Arce-Flores in all felony cases. There is a 2002 "General Order" signed by Judge Kazen – in his former capacity as the chief district judge for the Southern District of Texas – which provides that: "Duties which may be performed by a magistrate judge include . . . [c]onducting voir dire and selecting petit juries for the district court, to the extent allowed by law." *In the Matter of Jurisdiction and Procedures For Duties Assigned To United States Magistrate Judges In This District*, General Order No. 2002-13 (S.D. Tex. Dec. 13, 2002), available at www.txs.uscourts.gov/district/genord/2002/2002-13.pdf (visited Oct. 15, 2007).

exclusions with an unnamed staff member. R. 153 (J.A. 18).

After jury selection, the trial commenced before a visiting federal district judge, the Honorable Adrian Duplantier. R. 290. The jury convicted Mr. Gonzalez, R. 76-77, and Judge Kazen sentenced him to serve 190 months in prison. R. 92-98.

Mr. Gonzalez appealed to the United States Court of Appeals for the Fifth Circuit. Represented by new counsel on appeal (the Federal Public Defender), Mr. Gonzalez contended that the delegation of jury selection to the magistrate judge was erroneous because he had not explicitly and personally waived his right to have an Article III judge conduct jury selection. The Court of Appeals rejected his argument on alternative grounds: first, holding that the plain-error standard applied because Mr. Gonzalez had raised his claim for the first time on appeal, the court concluded that the alleged error of which he complained was not "plain"; alternatively, addressing the merits of his claim, the court held that delegation of jury selection to the magistrate judge was permissible because Mr. Gonzalez's trial counsel had given valid consent, and that the record need not also reflect Mr. Gonzalez's personal consent. J.A. 26-33.

SUMMARY OF ARGUMENT

A. Read together, the Court's decisions in *Gomez v. United States*, 490 U.S. 858 (1989), and

Peretz v. United States, 501 U.S. 923 (1991), allow a magistrate judge to conduct felony jury selection under the "additional duties" clause of the Federal Magistrates Act ("FMA")[5] only if a defendant consents. Such consent is necessary for an effective waiver of the defendant's right to an Article III judge. Section 636(b)(3) is silent about the *form* of consent by a defendant that is required for there to be an effective waiver of the defendant's right to an Article III judge. The Court has held that a defendant's explicit, personal waiver of other important constitutional rights that affect the framework within which the trial proceeds, such as the right to a jury trial,[6] is necessary for an effective waiver. Similarly, in order to effect a constitutional waiver of a federal defendant's right to an Article III judge, the defendant must give explicit, personal consent to have a magistrate judge preside over critical stages of a felony trial, including jury selection. Consent of defense counsel alone is not constitutionally sufficient to waive the defendant's right to an Article III judge.

The Court, however, need not address the serious constitutional question of whether a district court can delegate felony jury selection to a magistrate judge based solely on defense counsel's consent.

---

[5] 28 U.S.C. § 636(b)(3).

[6] *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275, 277-78 (1942) (citing *Patton v. United States*, 281 U.S. 276, 312 (1930), *overruled on other grounds, Williams v. Florida*, 399 U.S. 78, 90-93 (1970)).

Rather, applying the doctrine of constitutional avoidance, the Court should interpret the FMA's "additional duties" clause to require a federal criminal defendant's explicit, personal consent to such delegation in order to authorize a magistrate judge to conduct felony jury selection under the statute. In filling the statutory interstice in the FMA concerning the type of consent required, the Court should import the statutory waiver provision in 18 U.S.C. § 3401(b). The additional duties clause and § 3401(b) clearly are *in pari materia*. The latter requires the record to reflect the defendant's explicit, personal consent to have a magistrate judge preside in a federal misdemeanor case. No less should be required in a federal felony case in which a critical stage of the proceedings is delegated to a magistrate judge.

Because Mr. Gonzalez did not give valid consent, he did not waive his right to have an Article III judge conduct jury selection. At the time his attorney purported to give consent to the magistrate judge at the bench, Mr. Gonzalez was not present at the bench and did not have the assistance of an interpreter. The record thus fails to show that Mr. Gonzalez gave express, personal consent. Alternatively, even if this Court were to apply a less exacting personal waiver standard than the one in § 3401(b) – instead, only requiring, as occurred in *Peretz*, that defense counsel consent in his client's presence and also confirm his client's consent – no such consent appears in the record in this case. Under either standard, Mr. Gonzalez did not waive his right to an Article III judge.

B. Although Mr. Gonzalez raised his claim for the first time on direct appeal, it is not subject to the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b) for four reasons. First, under Federal Rule of Criminal Procedure 51(b), Rule 52(b) does not apply because Mr. Gonzalez did not have a realistic opportunity to object to the magistrate judge's failure to obtain his personal consent. Second, because a defendant must personally and affirmatively waive the right to an Article III judge, Mr. Gonzalez's silence did not qualify as a "forfeiture" under Rule 52(b); without a valid waiver or forfeiture, the plain-error standard simply does not apply. Third, because this type of "lack-of-personal-waiver" claim raised by Mr. Gonzalez on appeal necessarily would not arise without a lack of objection in the district court, it would be illogical to apply the plain-error standard to this type of claim. Fourth, application of the federal plain-error standard to this type of lack-of-personal-waiver claim would anomalously impose stricter error-preservation requirements on federal defendants than the requirements for similarly situated state defendants who appeal to this Court. For these reasons, Rule 52(b) does not apply in this case.

Alternatively, even if Rule 52(b) applies in this case, Mr. Gonzalez would still be entitled to a reversal of his conviction under the plain-error standard set forth in *United States v. Olano*, 507 U.S. 725 (1993). Under the Court's precedents, the delegation of jury selection to the magistrate judge without

Mr. Gonzalez's personal consent was plain error, both as a constitutional and statutory matter. The type of structural error caused by the nonconsensual delegation satisfies *Olano*'s requirement that the error affected Mr. Gonzalez's "substantial rights." And, finally, the nonconsensual delegation of a critical stage of a federal felony case to a non-Article III judge seriously affects the fairness, integrity, and public reputation of the judicial proceedings.

ARGUMENT

I. UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE COURT SHOULD INTERPRET 28 U.S.C. § 636(b)(3) TO REQUIRE A FEDERAL CRIMINAL DEFENDANT'S EXPLICIT AND PERSONAL WAIVER OF THE RIGHT TO AN ARTICLE III JUDGE IN ORDER FOR A MAGISTRATE JUDGE TO CONDUCT FELONY JURY SELECTION.

A. Introduction

The Federal Magistrates Act ("FMA") provides that, besides certain duties expressly set forth in the Act, "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). Section 636(b)(3) is silent about whether a defendant must consent to a district judge's delegation of a critical stage of a federal felony case, such as jury selection, to a magistrate judge. In

Gomez v. United States, 490 U.S. 858 (1989), the Court unanimously held that, in order to avoid the serious constitutional question that would arise if a magistrate judge conducted felony jury selection without a defendant's consent, the Court would interpret § 636(b)(3) to prohibit nonconsensual delegation of jury selection. *Gomez*, 490 U.S. at 860, 863-64, 870-76. Because there was no consent of any type given in *Gomez* – by defense counsel or the defendant – this Court did not address whether delegation with consent is permissible.

Two years later, in *Peretz v. United States*, 501 U.S. 923 (1991), a closely divided Court held that there was no serious constitutional question to avoid in interpreting the "additional duties" clause because there was evidence in the record that both Peretz and his attorney had consented to have a magistrate judge conduct felony jury selection. *Id.* at 932-40.[7] In *Peretz*, in the presence of his client, defense counsel stated that he "would love the opportunity" to have the magistrate judge conduct jury selection (in place of the district judge) and later specifically confirmed

[7] In dissent, three Justices concluded, after applying the doctrine of constitutional avoidance, that 28 U.S.C. § 636(b)(3) does not permit a magistrate judge to conduct jury selection in a federal felony prosecution even with a defendant's consent. *Peretz*, 501 U.S. at 940-52 (Marshall, J., dissenting, joined by White & Blackmun, JJ.). Justice Scalia separately dissented, on the ground that the statutory language of the FMA did not authorize delegation of felony jury selection to magistrate judges. *Id.* at 955-56 (Scalia, J., dissenting).

on the record that the magistrate judge had the "consent" of both defense counsel and his "client" to conduct jury selection. *Id.* at 925 & n.2. The Court in *Peretz* concluded "that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent" and, therefore, that the magistrate judge had authority to conduct jury selection under § 636(b)(3). *Id.* at 932. The defendant's consent was "the crucial difference" between that case and *Gomez*. *Peretz*, 501 U.S. at 933.

The question not addressed in *Gomez* and *Peretz*[8] – which is presented in Mr. Gonzalez's case – is whether a defense attorney's consent to have a magistrate judge

---

[8] In *Gomez*, the defendant expressly objected to the delegation, and in *Peretz* defense counsel both consented in the presence of his client and expressly confirmed that his client also had consented to the delegation. *Gomez*, 490 U.S. at 860; *Peretz*, 501 U.S. at 925 & n.2. Justice Marshall's dissenting opinion in *Peretz* contended that, assuming *arguendo* that a magistrate judge has authority to conduct jury selection with a defendant's consent, a defendant himself must give personal, express consent in writing (rather than through his counsel's oral statement). *See Peretz*, 501 U.S. at 947 n.6 (Marshall, J., dissenting). The majority opinion, Justice Marshall observed, had simply "assum[ed] that there was effective consent in" *Peretz*. *Id.* The majority opinion in *Peretz* did not respond to the alternative argument made by Justice Marshall in footnote 6 of his dissenting opinion – likely because the Court's order granting certiorari in *Peretz* did not ask the parties to address what *form* of "consent" is required. Instead, it simply asked the parties to address the larger issue of whether 28 U.S.C. § 636 "permit[s] a magistrate to conduct *voir dire* in a felony trial if the defendant consents." *Peretz v. United States*, 498 U.S. 1066 (1991).

conduct felony jury selection is constitutionally sufficient to waive a defendant's right to an Article III judge or whether, instead, the defendant's personal consent is necessary. Mr. Gonzalez contends that delegation of jury selection to a magistrate judge without a defendant's express and personal consent violates the defendant's constitutional right to an Article III judge. However, as explained below, under the doctrine of constitutional avoidance, this Court should avoid addressing this constitutional issue by interpreting § 636(b)(3) to require such consent.

B. Whether A Magistrate Judge May Conduct Felony Jury Selection Without The Express, Personal Consent Of The Defendant Is A Serious Constitutional Question.

1. Article III Judges Occupy A Place Of Historic Importance Within Our Constitutional System.

Article III vests the "judicial [p]ower" of the United States in life-tenured federal judges whose positions are not subject to diminution in salary; such judges are appointed by the President with the advice and consent of the Senate and can only be removed through the impeachment process. *See* U.S. Const. art. III, § 1; *see also United States v. Hatter*, 532 U.S. 557, 567-70 (2001) (discussing Article III, § 1).

The Founders clearly believed that such independent "Article III judges" would be integral to our

tripartite constitutional system of government. *See Hatter*, 532 U.S. at 567 (discussing Alexander Hamilton's influential *Federalist Nos. 78 & 79*, in which he explained why Article III, § 1, is a critical component of our tripartite system of government); *id.* at 568 ("Hamilton's view, and that of many other Founders, was informed by first-hand experience with the harmful consequences brought about when a King of England 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'") (quoting THE DECLARATION OF INDEPENDENCE ¶ 11).

Article III's provision for an independent federal judiciary exists not only to benefit individual litigants in particular cases but also to guarantee the fairness, integrity, and public reputation of the judicial process by fostering excellence within the federal judiciary and promoting the doctrines of separation of powers and checks and balances. *See Hatter*, 532 U.S. at 568; *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-51 (1986) (discussing both the "structural" and "personal" interests protected by Article III, § 1). With respect to litigants' personal interests under Article III, § 1, federal criminal defendants benefit the most from judicial independence. As Chief Justice John Marshall said two centuries ago, judicial independence is most significant when a judge is required to decide "between the Government and the man whom the Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular."

Hatter, 532 U.S. at 568-69 (citation and internal quotation marks omitted).[9] The "greatest scourge . . . ever inflicted," said Marshall, was a "dependent judiciary." *Id.* at 569 (citation and internal quotation marks omitted). The Founders' concerns about the need to establish an independent federal judiciary as reflected in Article III, § 1, "are no less important today than in earlier times." *Id.*

2. Federal Magistrate Judges Lack The Institutional Independence of Article III Judges.

Although magistrate judges are considered "adjuncts" to Article III (district) judges, *see Thomas v. Arn*, 474 U.S. 140, 154 n.14 (1985), they are nonetheless not Article III judges, and their office does not have the structural protections created by Article III, § 1. In particular, magistrate judges serve eight-year terms, may be removed from office by district judges for cause,[10] and are subject to potential diminution of their salaries and outright abolition of their office by

---

[9] The "protected core" of Article III judicial power includes federal criminal cases, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.25 (1982) (plurality); *see also United States v. Johnston*, 258 F.3d 361, 366-72 (5th Cir. 2001) (concluding that even consensual delegation of a post-conviction felony criminal proceeding under 28 U.S.C. § 2255 to a magistrate judge violates Article III); *id.* at 370 n.5 ("[M]atters relating to federal criminal [cases] evince greater Article III concerns than do those linked to civil cases.").

[10] *See* 28 U.S.C. § 631(e) & (i).

Congress.[11] If magistrate judges seek to serve additional terms, they must undergo a reappointment process in which they are potentially subject to criticism by various institutional players[12] – such as members of the local bar, including federal prosecutors. In addition, some magistrate judges aspire to obtain perceived higher or better offices – often an Article III judgeship or the office of the United States Attorney, both of which require presidential appointment and confirmation by the Senate.[13] Therefore, a sitting magistrate judge is subject to the type of influences that the Founders feared would jeopardize judicial independence.

---

[11] *See* J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1060 (1985).

[12] *See* 28 U.S.C. § 631(b)(5); *see also* Judicial Conference of the United States, *Selection, Appointment, and Reappointment of United States Magistrate Judges*, Appendix H ("Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges," ch. 3) (2001).

[13] *See, e.g.*, *Judge Hopes For A Hearing: Clock Is Ticking, But Fresno-Based Magistrate May Slide Through Confirmation*, FRESNO BEE, Sept. 2, 2006, at B1, 2006 WLNR 15392459 (discussing President's nomination of federal magistrate judge for a federal district judgeship); *Magistrate Judges Demystified: Once Underappreciated, U.S. Magistrate Judges Finally Get Some Respect*, TEXAS LAWYER, Jan. 7, 2002, at 1 (available on Westlaw) (reporting that "U.S. Magistrate Judge Jane Boyle of Dallas was nominated to be U.S. attorney for the Northern District").

That federal district judges are the ones who initially appoint and later decide whether to reappoint magistrate judges does not allay these concerns. As Judge Posner has observed (in contending that magistrate judges should not be permitted to try federal civil cases even with consent):

> The fact that the appointing power has been given to Article III judges is the opposite of reassuring. It makes magistrates beholden to judges as well as to Congress. The separation of powers is not merely tripartite. The Constitution built internal checks and balances into . . . the judicial branch by guaranteeing all federal judges – not just Supreme Court Justices, or appellate judges generally – tenure during good behavior and protection against pay cuts. Appellate judges can reverse district judges, can mandamus them, can criticize them, can remand a case to another judge, but cannot fire district judges, cow them, or silence them – cannot prevent them from making independent judgments and expressing independent views. . . . [A]s long as the [district] judges . . . enjoy the tenure and compensation protections of Article III, they are independent of [appellate] judges . . . Magistrates do not have those protections; the [district] judges control their reappointment.

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting); *see also Northern Pipeline*, 458 U.S. at 59 n.10 (plurality) ("The guarantee of life tenure insulates [an Article

III] judge from improper influences not only by other branches but by [judicial] colleagues as well, and thus promotes judicial individualism.").

3. Having An Independent Judge Conduct Felony Jury Selection Is A Core Article III Concern.

The constitutional right to trial by jury in a criminal prosecution "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). By placing the right to a jury trial in federal criminal cases in Article III, § 2, cl. 3, of the original Constitution – before the Bill of Rights was adopted – the Founders demonstrated their belief that juries in federal criminal cases were a structural protection similar in importance to vesting federal judicial power in life-tenured, independent judges. *See Wilkerson v. Whitley*, 28 F.3d 498, 502 (5th Cir. 1994) (*en banc*) (quoting from Hamilton's *Federalist No. 83*, which referred to Article III's right to a criminal jury trial as "the very palladium of free government"); *see also Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

Of the many "critical stages" of a felony case, jury selection is one of the most important in our justice

system because it implicates not only the defendant's interest in a fair trial[14] but also society's interest in having the jury serve a "representative function" in our constitutional democracy.[15] The Court repeatedly has recognized that application of the many constitutional rules governing jury selection – rules concerning the questions to be posed to the members of the venire, the standards for removing prospective jurors for cause, and challenges to allegedly discriminatory use of peremptory strikes – are primarily safeguarded by the careful exercise of a trial judge's sound discretion.[16]

---

[14] *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992) ("*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.") (citations and internal quotation marks omitted).

[15] *Miller-El v. Dretke*, 545 U.S. 231, 272-73 (2004) (Breyer, J., concurring) (noting the importance of a fair jury selection process because " 'the institution of the jury raises the people . . . to the bench of judicial authority [and] invests [them] with the direction of society' ") (quoting 1 A. de Tocqueville, DEMOCRACY IN AMERICA 287 (H. Reeve transl. 1900)).

[16] *See, e.g., Uttecht v. Brown*, 127 S. Ct. 2218, 2223 (2007) ("The judgment as to whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.") (citations and internal quotation marks omitted); *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (plurality) ("Since the trial judge's findings in the context [of allegedly discriminatory peremptory strikes] largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."); *Ristaino*

(Continued on following page)

In view of both the tremendous importance of proper jury selection and the weighty responsibility vested in a trial judge during the selection process, both federal criminal defendants and members of society, including prospective jurors, have a keen interest in having an independent Article III judge conduct jury selection. Although a majority of the Court in *Peretz* concluded that a defendant could consent to have a magistrate judge conduct felony jury selection, the Court in *Gomez* unanimously concluded that "we harbor serious doubts that a district judge could review this function meaningfully." *Gomez*, 490 U.S. at 874; *accord Peretz*, 501 U.S. at 935 n.12. The Court's doubts were based on the fact that, during the jury selection process, almost all of the decisions made by the presiding judge are within the judge's essentially unreviewable discretion. *See id.* at 874-75 (in deciding whether prospective jurors are biased, the judge "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality"). Even if review of a magistrate judge's decision-making during jury selection by a district judge were possible, "only words can be preserved for review; no transcript can recapture the atmosphere of *voir dire*,

---

v. Ross, 424 U.S. 589, 594-95 (1976) ("*Voir dire* is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. . . . This is so because the determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.") (citations and internal quotation marks omitted).

which may persist throughout the trial." *Id.* And, even if a district judge on review were to re-question members of the venire, "as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Id.* at 875 n.29.

4. A Constitutionally Effective Waiver Of The Right To An Article III Judge At Felony Jury Selection Requires A Federal Defendant's Express And Personal Consent To Delegation To A Magistrate Judge.

The Court's decisions in *Gomez* and *Peretz*, when read together, hold that a federal criminal defendant's consent to have a magistrate judge conduct jury selection is sufficient to bestow authority on the magistrate judge under 28 U.S.C. § 636(b)(3) and avoid constitutional doubt; however, those decisions do not specifically address what *type* of consent is sufficient to avoid constitutional doubt. As discussed below, this Court's precedents – addressing both the right to an Article III judge and similar fundamental rights of criminal defendants – require a defendant's express and personal consent to delegation of jury selection to a magistrate judge in order to accomplish a constitutionally effective waiver of the right to an Article III judge.

a. A Defendant's Mere Silence Does Not Amount To "Consent" Or "Waiver."

Obtaining a defendant's consent to have a magistrate judge conduct jury selection is not a routine matter. Rather, it is nothing less than waiver of the defendant's right to have an Article III judge preside during that critical stage of trial. *See Peretz*, 501 U.S. at 936-37 ("There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants *consent*. . . . We have previously held that litigants may *waive* their personal right to have an Article III judge preside over a civil trial.") (citing *Schor*, 478 U.S. at 848) (emphasis added); *see also Schor*, 478 U.S. at 848-50 (discussing concepts of "waiver" and "consent" interchangeably) (citations omitted).

There are passages in the *Peretz* majority opinion that, when read in isolation, appear to equate a defendant's lack of objection to delegation of jury selection to a magistrate judge with "consent" or "waiver."[17] Such passages, however, must be read in

---

[17] *See Peretz*, 501 U.S. at 936-37 ("[A] defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence. . . . [T]he Constitution gives . . . no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of the jury."); *id.* at 940 ("We agree . . . that permitting a magistrate judge to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely

(Continued on following page)

the context of the particular circumstances of *Peretz*: the lack of objection in that case occurred only after the defense attorney (in the presence of his client) expressly had consented and thereafter confirmed on the record that the consent was both the attorney's and his client's. *Peretz*, 501 U.S. at 925 & n.2. Therefore, the Court's discussion of Peretz's failure to object was set against the backdrop of his knowledge that his attorney had expressly consented for him and his failure thereafter to object. In other words, this Court's decision in *Peretz* cannot be read beyond its facts to broadly provide that a defendant's silence *by itself* constitutes "consent" or "waiver."

Moreover, to read *Peretz* as creating a rule that a defendant's silence by itself equates to consent – and, thus, waiver of his right to an Article III judge – would conflict with this Court's definition of "waiver." In *United States v. Olano*, 507 U.S. 725 (1993), the Court stated that a defendant's "waiver" of a right is not accomplished by a defendant's mere silence; instead, "waiver" is "the intentional relinquishment or abandonment of a known right." *Id.* at 733 (citations and internal quotation marks omitted);[18] *cf.*

---

faithful to the congressional purpose in enacting and amending the [FMA].").

[18] In *Olano*, the Court stated that: "Whether a particular right is waivable [at all]; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." 507 U.S. at 733. As explained above, a federal defendant's

(Continued on following page)

North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("[M]ere silence is not enough [for a valid *Miranda* waiver]. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his [*Miranda*] rights."). Therefore, a defendant's mere silence by itself when a magistrate judge selects a felony jury does not amount to "waiver" under *Peretz*.

The Court's discussion of the concept of waiver in *Olano* is consistent with the Court's treatment of the Article III waiver issue in *Schor*. The Court held that Schor, a civil litigant, had "waived" his right to an Article III judge and thereby "consented" to have a non-Article III adjudicator preside. *Schor*, 478 U.S. at 849. The Court's conclusion that an effective waiver had occurred was not based on Schor's silence when a non-Article III adjudicator presided but, instead, was based on the fact that Schor had "expressly demanded" that his adversary proceed in the non-Article III forum and "was content to have the entire dispute settled in the forum he had selected until the [administrative law judge] ruled against him on all counts." *Id.*

---

right to have an Article III judge conduct felony jury selection is the type of right that requires the defendant's personal participation in the knowing and voluntary waiver of the right.

b. Defense Counsel Cannot Unilaterally Waive A Defendant's "Personal" And "Basic" Right To An Article III Judge.

Relying on the Court's decision in *New York v. Hill*, 528 U.S. 110 (2000), the Court of Appeals held that, notwithstanding Mr. Gonzalez's silence, his counsel was empowered unilaterally to consent to have the magistrate judge conduct jury selection. J.A. 26, 32-33 ("[T]he right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel."). The Court of Appeals' reliance on *Hill* was misplaced.

In *Hill*, the Court held that a defense attorney's agreement to continue his client's trial validly waived the defendant's right to a speedy disposition of charges under the Interstate Agreement on Detainers ("IAD"), even though the record did not establish the defendant's personal assent to counsel's waiver of the IAD's time limits. 528 U.S. at 111-13. The Court stated that, "What suffices for waiver depends on the nature of the right at issue." *Id.* at 114. "For certain fundamental rights, the defendant must personally make an informed waiver"; "[f]or other rights, however, waiver may be effected by action of counsel." *Id.* "'Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial.'" *Id.* at 114-15 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). The Court concluded

that the attorney's agreement to continue his client's trial was by itself sufficient to waive his client's rights under the IAD because "[s]cheduling" a trial is the type of "routine" strategic decision within the province of counsel's discretion. *Hill*, 528 U.S. at 115-18.

Waiver of the right to have an Article III judge conduct felony jury selection differs significantly from waiver of the right to a speedy disposition of criminal charges and other such "routine" issues during the trial proceedings. In contrast to a mere "[s]cheduling matter," *Hill*, 528 U.S. at 115, the right to have an Article III judge preside in a federal felony case – particularly during a critical stage like jury selection – is a weighty one with an impressive constitutional pedigree. *See Hatter*, 532 U.S. at 568-69; *see also Schor*, 478 U.S. at 847-48; *Northern Pipeline*, 458 U.S. at 57-60, 70 n.25 (plurality). And, unlike evidentiary matters and routine legal objections made (or forgone) during the course of a trial, which concern issues of strategy and thus are within the province of defense counsel's discretion, *see Hill*, 528 U.S. at 115,[19] waiver of the right to have an Article III judge

[19] *See, e.g.*, *Taylor*, 484 U.S. at 417-18 (holding that an attorney's deliberate decision to engage in misconduct regarding pretrial disclosure of the identity of a defense witness was imputed to the defendant for purposes of waiving the defendant's right to compulsory process; "[t]he adversary process could not function effectively if every tactical decision required client approval").

conduct felony jury selection is not a mere strategic or tactical matter.[20]

Instead, the right to have an Article III judge preside during a critical stage of a federal felony case is one of those "'basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client. . . .'" *Hill*, 528 U.S. at 114-15 (quoting *Taylor*, 484 U.S. at 417-18). As examples of such "basic rights" requiring a defendant's personal waiver, the Court in *Hill* cited cases concerning the right to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), and the right to plead not guilty, *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). *See Hill*, 528 U.S. at 114-15. Similarly, in *Taylor*, in addition to citing *Brookhart*, the Court gave, as examples, cases involving other "basic" rights requiring a defendant's personal waiver: *Doughty v. State*, 470 N.E.2d 69 (Ind. 1984) (right to a jury trial), and *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963) (constitutional right to be present during trial). *See Taylor*, 484 U.S. at 417-18 & n.24. The Indiana Supreme Court's decision in *Doughty*, which this Court

---

[20] Although there may be a strategic or tactical reason for allowing a magistrate judge to select the jury, the waiver of the right to an Article III judge during felony jury selection "is not simply a strategic choice" that may be exercised by defense counsel alone. *Cf. Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (stating that "[w]hile a guilty plea may be tactically advantageous for the defendant, . . . the plea is not simply a strategic choice" that can be made solely by defense counsel).

cited in *Taylor* as an example of the waiver procedure for a "basic" right, set forth that procedure:

> A waiver of this right [to a jury trial] must be made in a knowing, intelligent, and voluntary manner, with sufficient awareness of the surrounding circumstances and the consequences. . . . The record must reflect that such a waiver was made, so that the question of an effective waiver can be reviewed even though no objection was made at trial. . . . The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right.

Doughty, 470 N.E.2d at 70.[21]

Significantly, in *Schor*, which was cited by the Court in *Peretz* for the proposition that the right to an Article III judge can be waived,[22] the Court held that

---

[21] *See also Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (discussing a defendant's waiver of right to trial by jury and citing *Patton*, 281 U.S. at 312); *Patton*, 281 U.S. at 312 (requiring "the express and intelligent consent of the defendant" for a valid waiver of jury trial to occur). To this list of basic rights requiring a personal waiver by a defendant should be added the right to a felony indictment by a federal grand jury. *See United States v. Macklin*, 523 F.2d 193, 196 (2d Cir. 1975) ("[T]he waiver of indictment has been deliberately clothed in formal procedure. It must be made in open court and the defendant must be told the nature of the charge and informed of his rights before he is allowed to consent to the waiver.").

[22] *Peretz*, 501 U.S. at 936 ("litigants may waive their personal right to . . . an Article III judge" in civil cases) (citing *Schor*).

the "personal right [conferred by] Article III[] . . . is subject to waiver, *just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried.*" 478 U.S. at 848-49 (emphasis added). As examples of two such "personal" rights subject to waiver in the criminal context, the Court in *Schor* cited cases involving the right to plead not guilty, *Boykin v. Alabama*, 395 U.S. 238 (1969), and the right to a jury trial, *Duncan*, 391 U.S. at 158. *See Schor*, 478 U.S. at 848-49. The right to plead not guilty and the right to a jury trial are the same type of "basic," "personal" rights discussed by the Court in *Hill* and *Taylor*; as noted, both require an express, personal waiver by the defendant for the waiver to be constitutionally effective. *See Hill* 528 U.S. at 114-15.

In another context, the Court has described this class of personal rights that "dictate the procedures by which . . . criminal matters must be tried," *Schor*, 478 U.S. at 848-49, as rights that "affect[] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The Court in *Fulminante* identified this special class of rights as those which, if violated, would result in a reversal of a defendant's conviction on appeal without any showing that the violation had harmed the defendant. *See id.* at 309-10 ("These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."). The Court gave, as examples, the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the right to an

impartial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927). *See Fulminante*, 499 U.S. at 309.

Notably, in *Gomez*, the Court unanimously characterized the right to an Article III judge during felony jury selection as a "basic fair trial right" that, if violated, would not be subject to harmless-error analysis on appeal. *Gomez*, 490 U.S. at 876. The Court specifically analogized the right to an Article III judge to the right to an impartial judge or jury, and observed that violations of these basic rights always will result in a reversal of a defendant's conviction because they are not amenable to harmless-error analysis. *Id.* Although the Court in *Gomez* was speaking in the context of harmless-error analysis rather than in the context of waiver requirements, the Court's decisions in *Fulminante* and *Schor*, when read together, suggest that the Court's treatment of a right as "structural" and "basic" in the former context should inform, at least in part, its treatment of the right as "personal" and "basic" in the latter. *Cf. United States v. Nelson*, 277 F.3d 164, 205-07 (2d Cir. 2002) (doubting that a meritorious claim of an actually biased jury could be "waived" by a criminal defendant; stating that, at the very least, such a waiver would require a defendant's knowing and voluntary relinquishment of the right to an impartial jury) (citing *Brookhart*, 384 U.S. at 4).

The Court repeatedly has said that waiver of such fundamental rights, in order to be valid, must constitute the "intentional relinquishment or abandonment of a known right or privilege." *See, e.g.*,

College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board, 527 U.S. 666, 682 (1999) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), as providing the "classic description" of such a waiver formulation). This waiver formulation necessarily implies that, at minimum, the defendant himself must be aware of the relinquishment of the right in question and give his personal assent to its relinquishment.

Furthermore, these basic rights share something in common: they "must be exercised or waived at a specific time or under clearly identifiable circumstances. . . ." *Barker v. Wingo*, 407 U.S. 514, 529 (1972) (listing, as examples, waivers of "the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel"). The Court has "placed the entire responsibility on the prosecution to show the claimed waiver [of such basic rights] was knowingly and voluntarily made." *Id.*

c. The Constitutional Avoidance Doctrine Requires The Court To Avoid The Serious Constitutional Question Raised In This Case.

The foregoing discussion of the Court's precedents demonstrates that the right to an Article III judge during felony jury selection ranks among what the Court has characterized as "basic" and "personal" rights of a criminal defendant. Therefore,

this fundamental right should be subject to the same constitutional waiver requirements as similar rights – in particular, that "the express and intelligent consent of the defendant" appear on the record in order for a valid waiver to occur. *Patton*, 281 U.S. at 312. However, rather than so holding as a constitutional matter, the Court can and should avoid resolving that serious constitutional question by instead interpreting 28 U.S.C. § 636(b)(3) to require such a personal waiver of the right to an Article III judge by a defendant. *Cf. Gomez*, 490 U.S. at 862-64 (applying constitutional avoidance doctrine in interpreting § 636(b)(3) to prohibit nonconsensual delegation of jury selection to a magistrate judge); *see also Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of [a] statute is fairly possible by which the [serious constitutional] question may be avoided."). As discussed below, in addition to the doctrine of constitutional avoidance, well-established principles of statutory construction support such an interpretation of the "additional duties" clause.

C. The "Additional Duties" Clause Of The FMA Should Be Interpreted *In Pari Materia* With 18 U.S.C. § 3401(b).

The "additional duties" clause is silent about whether a defendant's "waiver" or "consent" permits delegation of felony jury selection to a magistrate judge and, for that reason, obviously does not prescribe any *form* of waiver or consent. Therefore, in

interpreting the statute to avoid the serious constitutional question discussed above, the Court must do what often is required when Congress has been silent: judicial "gap filling in an area left open by statute." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990); *cf. Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("We have filled the gaps of the habeas corpus statute. . . .").

In *Gomez*, the Court unanimously recognized – and the United States agreed – that, in enacting the FMA, "Congress . . . did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties." 490 U.S. at 872 & n.22; *see also id.* at 875-76. In *Peretz*, a majority of the Court concluded that, notwithstanding such a lack of congressional intent, "the structure and purpose of the [FMA] convince us that supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent." 501 U.S. at 935.

What the Court is left to do in petitioner's case is to fill the gap by determining what Congress would have done in enacting the FMA had it expressly addressed the "crucial"[23] consent issue.[24] The Court

---

[23] *Peretz*, 501 U.S. at 933 ("[T]he litigants' consent makes the crucial difference. . . .").

[24] *Cf. Zadvydas v. Davis*, 533 U.S. 678, 690-702 (2001) (avoiding constitutional doubt by filling gap in federal immigration statute concerning whether indefinite detention of non-removable aliens is permitted; divining likely congressional

(Continued on following page)

need not rewrite a significant portion of the FMA to do so but, instead, need only fill a single interstice. *See United States v. Jackson*, 390 U.S. 570, 580 (1968) ("It is one thing to fill a minor gap in a statute. . . . It is quite another thing to create from whole cloth a complex and completely novel procedure . . . for the sole purpose of rescuing a statute from a charge of unconstitutionality.").

There is a ready answer to the question of what Congress would have done in enacting the FMA had it been prescient of this Court's decisions in *Gomez* and *Peretz*. The answer is provided by a closely related statute, 18 U.S.C. § 3401(b). Section 3401(a) provides that "any United States magistrate judge shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district." 18 U.S.C. § 3401(a). Section 3401(b) specifically addresses the crucial consent issue:

> Any person charged with a misdemeanor, other than a petty offense may elect, however, to be tried before a district judge for the district in which the offense was committed.

---

intent and creating presumptive rule that non-removable aliens must be released after six months of detention); *see also Dixon v. United States*, 126 S. Ct. 2437, 2445 (2006) ("The offenses . . . were created by statute in 1968. . . . There is no evidence in the Act's structure or history that Congress actually considered how the duress defense should work in this context. . . . [Thus,] we must determine what that defense would look like as Congress 'may have contemplated' it.") (citations omitted).

> *The magistrate judge shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge. . . . The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record.*

18 U.S.C. § 3401(b) (emphasis added). This statutory provision unquestionably requires the very type of "explicit" and "personal" waiver mentioned in the Court's first question presented in this case.[25]

The legislative history regarding § 3401 is informative. *See City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 129 (2005) (Stevens, J., concurring in the judgment) ("[W]e must fill the gap in the statute's text by examining all relevant evidence that sheds light on the intent of the enacting Congress[,] [including] legislative history."). The House Report concerning this statutory provision stated:

> . . . 18 U.S.C. § 3401 would be amended to allow full and part-time magistrates to try with consent of the accused any criminal jury

[25] Like this Court in *Peretz* and *Schor*, Congress's simultaneous use of the terms "consent" and "waiver" in section 3401(b) suggests that Congress believed that these two concepts are closely related in the Article III context.

> or non-jury misdemeanor [case] . . . It should be noted that the Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In order for a waiver of a constitutional right to occur, a "knowing and intelligent waiver" is necessary. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Subsection (b), by requiring that the magistrate "carefully" explain the right to trial before a district judge . . . incorporates this case law. It also requires that the record show that the accused intelligently and understandably rejected the offer, for "anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506 (1962). . . .

H.R. Rep. No. 287, 96th Cong., 1st Sess., 17-18 (1979).

The FMA and 18 U.S.C. § 3401(b) clearly are *in pari materia*,[26] as Congress explicitly cross-referenced § 3401 in § 636. *See* 28 U.S.C. § 636(a)(3) ("Each United States magistrate judge . . . shall have . . . the power to conduct [misdemeanor] trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section[.]").

---

[26] *See* Norman J. Singer, 2B SUTHERLAND ON STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000) ("Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.") (footnotes and citations omitted).

Therefore, in filling the gap in the "additional duties" clause, the Court should import § 3401(b)'s waiver provision. *See Grace v. Collector of Customs*, 79 F. 315, 319 (9th Cir. 1897) ("This rule of construction [*i.e.*, the *in pari materia* canon] often requires gaps left in the act, not amounting to *casus omiss[us]*, to be filled from the materials supplied by other statutes upon the same subject, and in harmony with them."); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) (under the *in pari materia* canon of statutory construction, "statutes addressing the same subject matter generally should be read as if they were one law") (citations and internal quotation marks omitted).[27]

It requires no stretch of logic to conclude that Congress would have required such explicit, personal consent by a defendant if Congress had enacted a specific waiver provision for delegation of felony jury selection to a magistrate judge. Indeed, as a majority of the Court in *Peretz* stated, the complete delegation of "civil and misdemeanor trials" to magistrate judges

---

[27] As discussed above, although the unanimous Court in *Gomez* appeared to believe that delegation of felony jury selection to a magistrate judge was a *casus omissus* (*i.e.*, an intentional omission) in the FMA, *see Gomez*, 490 U.S. at 875-76, the subsequent majority in *Peretz* stated that "the Act's 'additional duties' clause permits a magistrate to supervise jury selection in a felony trial provided that the parties consent." *Peretz*, 501 U.S. at 933. Therefore, in light of *Peretz*, this Court should resort to the *in pari materia* canon of statutory construction to fill the gap in the FMA by importing the waiver provision in 18 U.S.C. § 3401(b).

under 28 U.S.C. § 636(a)(3) and (c) is "comparable in responsibility and importance to [a magistrate judge's] presiding over *voir dire* at a felony trial." *Peretz*, 501 U.S. at 933; *but see id.* at 942-43 (Marshall, J., dissenting, joined by White & Blackmun, JJ.) (contending that a magistrate judge's supervision of felony jury selection is *more* important than a magistrate judge's presiding over misdemeanor and civil cases). If, in enacting the FMA, Congress believed a defendant's explicit, personal consent was constitutionally necessary to bestow authority upon a magistrate judge in federal misdemeanor cases, then *a fortiori* Congress would have believed that such explicit, personal consent is necessary to permit a magistrate judge to conduct felony jury selection.

In sum, the Court should fill the statutory gap in the FMA by importing the closely analogous consent provision in 18 U.S.C. § 3401(b). *Cf. DelCostello v. International Broth. of Teamsters*, 462 U.S. 151, 171-72 (1983) (adopting a closely analogous federal statute's limitations period, in exercise of "interstitial lawmaking," because "the federal policies at stake" were identical in the two statutory contexts). The Court should do so to avoid constitutional doubt, or, at the very least, as an exercise of this Court's supervisory authority. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of . . . procedure that are binding in those tribunals."); *see also United States v. Maragh*, 174 F.3d 1202, 1206-07 (11th Cir.)

(announcing a rule in the court's "supervisory capacity" requiring a showing on the record of a defendant's personal consent to have a magistrate judge conduct felony jury selection), *supp. op. on reh'g*, 189 F.3d 1315 (11th Cir. 1999).

D. The Requirement Of Explicit, Personal Consent By A Defendant Promotes, Rather Than Impairs, Judicial Efficiency.

In response to the defendants' arguments in *Hill* and *Taylor* that personal waivers of their rights were required, the Court observed that personal waivers in those situations would unnecessarily disrupt the trial proceedings and waste judicial resources.[28] Conversely, a bright-line rule requiring a criminal defendant's explicit, personal consent to have a magistrate judge conduct jury selection would promote, rather than frustrate, the efficient administration of justice.

---

[28] *See Hill*, 528 U.S. at 115 ("Requiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time for no apparent purpose."); *Taylor*, 484 U.S. at 418 (refusing to require personal waiver of the defendant's compulsory process rights because "the adversary process could not function effectively" if such a "tactical" matter required the defendant's personal approval); *see also* Wayne R. LaFave *et al.*, 3 CRIMINAL PROCEDURE 607 (2d ed. 1999) ("The practical necessities of the litigation process, although perhaps not dominant, certainly influence the allocation of control between counsel and client. The exercise of defendant's personal choice requires an opportunity for meaningful consultation that often is not practicable.") (citation and internal quotation marks omitted).

The right to an Article III judge during jury selection can be "waived at a specific time [and] under clearly identifiable circumstances"[29] (*i.e.*, during a pretrial conference or at the outset of jury selection); would take a brief amount of time; and could be done either orally or in writing in order to be in the record. It would be no more time-consuming than other explicit, personal waivers by criminal defendants at predictable junctures in the proceedings that occur on a daily basis in the federal criminal justice system. *See, e.g.*, Fed. R. Crim. P. 7(b) (waiver of right to an indictment by grand jury);[30] Fed. R. Crim. P. 23(a)(1) (waiver of right to jury trial).[31] Indeed, in the very division of the Southern District of Texas where Mr. Gonzalez's trial occurred, the district court routinely refers felony guilty plea hearings to magistrate judges, who obtain explicit, personal waivers of the right to an Article III judge from defendants. *See, e.g.*,

---

[29] *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

[30] "An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant – in open court and after being advised of the nature of the charge and of the defendant's rights – waives prosecution by indictment." Fed. R. Crim. P. 7(b).

[31] "If the defendant is entitled to a jury trial, the trial must be by jury unless . . . the defendant waives a jury trial in writing. . . ." Fed. R. Crim. P. 23(a)(1). The Advisory Committee Notes following this rule provide that: "The provision for waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld [in] *Patton v. United States*, . . . 281 U.S. 276. . . ." 1944 Advisory Committee Note to Subdivision (a). As discussed above, *Patton* required the express, personal waiver of a criminal defendant's right to a jury trial.

United States v. Luin-Cabarroca, 2005 WL 2840638 (S.D. Tex. – Laredo Div. Oct. 28, 2005) (unpublished order); *United States v. Soveranes-Ortiz*,. 2005 WL 2840648 (S.D. Tex. – Laredo Div. Oct. 13, 2005) (unpublished order).

Finally, such a bright-line rule would prevent post-conviction litigation involving claims that a defendant's trial counsel provided ineffective assistance by consenting without obtaining the defendant's knowing and voluntary concurrence. *Cf. United States v. Gamba*, 483 F.3d 942 (9th Cir. 2007) (in 2-1 decision, rejecting claim of ineffective assistance of counsel, which alleged that defense counsel's consent to have magistrate judge preside over closing argument in felony trial did not reflect the defendant's personal consent), *cert. pet. filed* (Aug. 17, 2007) (No. 07-6054).

E. Alternatively, An Effective Waiver At Least Requires The Record To Reflect The Defendant's Knowing and Voluntary Acquiescence In His Attorney's Explicit Waiver Of The Right To An Article III Judge.

Even if the Court were not to adopt a bright-line rule requiring an on-the-record showing that a criminal defendant himself expressly and personally consented, at the very least this Court should require a showing on the record that the defendant knowingly

and voluntarily acquiesced in his counsel's expressed consent.[32] In *Peretz*, that is what the record showed, *Peretz*, 501 U.S. at 925 & n.2, and the Court assumed that such a showing was sufficient evidence of the defendant's valid consent.[33]

---

[32] Some Courts of Appeals have followed this approach regarding a defendant's waiver of the right to a jury trial. *Compare United States v. Leja*, 448 F.3d 86, 92-95 (1st Cir. 2006) (record established defendant's waiver of his right to a jury where, although only counsel signed the written waiver form, the college-educated defendant was present when the waiver was discussed in open court; counsel specifically stated that "she had discussed the matter with Leja and he had agreed to the waiver"), *and United States v. Page*, 661 F.2d 1080, 1080-83 (5th Cir. 1981) (finding waiver of defendant's right to jury trial where defense counsel waived highly-educated, English-speaking defendant's right to a jury in defendant's presence and also assured judge that client personally consented to a bench trial), *with United States v. Mendez*, 102 F.3d 126, 129-31 (5th Cir. 1996) (distinguishing *Page* and reversing Spanish-speaking defendant's conviction where record failed to show that the defendant gave "specific acquiescence" to his attorney's decision to waive a jury).

[33] A majority of the Court found similar conduct by civil litigants to be sufficient to "imply" their consent to have a magistrate judge preside over their federal civil case. *See Roell v. Withrow*, 538 U.S. 580, 582-88 (2003); *but see id.* at 591-97 (Thomas, J., dissenting, joined by Stevens, Scalia & Kennedy, JJ.) (contending that express consent is required for valid delegation and that allowing delegation of civil trial to magistrate judge based solely on "implied" consent "raises serious constitutional concerns" under Article III). In *Roell*, the civil defendants (medical professionals employed by a state prison who had been sued by a state prisoner) did not sign a consent form or give express oral consent but – akin to the conduct of the criminal defendant in *Peretz* – voluntarily appeared before the

(Continued on following page)

If such a less exacting consent requirement were applied, the Court should conclude that Mr. Gonzalez still did not validly waive his right to have an Article III judge conduct jury selection. As the record demonstrates, when his attorney consented to have the magistrate judge conduct jury selection at the bench conference, Mr. Gonzalez was not present at the bench and did not have the assistance of an interpreter. J.A. 15-17. Unlike in *Peretz*, Mr. Gonzalez's counsel never stated that he had his client's consent. The record thus does not allow for a reasonable inference that Mr. Gonzalez – a Spanish-speaking Mexican citizen, who had no formal education in the United States, and whose prior experience in the state criminal justice system would not have informed him of his right to an Article III judge in a

---

magistrate judge after being expressly informed of their right to an Article III judge and their right to refuse consent to the magistrate judge. *Id.* at 582-87.

The Court's approval of implied consent in civil cases should not be followed in the criminal context. As the Court explained in *Roell*, the relevant waiver provision of the FMA for civil cases, 28 U.S.C. § 636(c)(1), speaks only of consent *simpliciter*, *Roell*, 538 U.S. at 587, as opposed to the much more stringent consent requirement set forth in 18 U.S.C. § 3401(b), which the Court should adopt in formulating a consent requirement for referrals to magistrate judges in felony cases under the "additional duties" clause of the FMA. Furthermore, as discussed above, the right to an independent, life-tenured federal judge under Article III, § 1, is even more important in criminal cases than in civil cases. *See United States v. Johnston*, 258 F.3d 361, 370 n.5 (5th Cir. 2001) ("[M]atters relating to federal criminal [cases] evince greater Article III concerns than do those linked to civil cases.").

federal felony proceeding – was at all aware of what his counsel was saying. This Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights" and cannot "presume acquiescence in the loss of fundamental rights." *College Savings Bank*, 527 U.S. at 682 (citations and internal quotation marks omitted). The record in this case does not establish that Mr. Gonzalez validly waived his right to an Article III judge, either explicitly or implicitly.

Finally, assuming *arguendo* that Mr. Gonzalez heard what was said at the bench conference, counsel's purported waiver of the right to an Article III judge was insufficient because the magistrate judge, in soliciting consent, did not state that Mr. Gonzalez had a right to refuse her request and demand an Article III judge; she merely asked if she could "assist" in jury selection. J.A. 15-16; *see Roell*, 538 U.S. at 587 n.5 ("Certainly, notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent. . . ."); *see also United States v. Wright*, 516 F. Supp. 1113, 1119 (E.D. Pa. 1981) (joint op. of Pollak & Shapiro, JJ.) (concluding that consent form that stated misdemeanants' willingness "to be tried . . . before" a magistrate judge was legally insufficient because it did not "specifically waive" the defendant's right to a district judge).[34]

---

[34] Notably, in Mr. Gonzalez's native country of Mexico (where he was educated), a "magistrate" judge (a "*magistrado*"

(Continued on following page)

II. THE COURT OF APPEALS ERRED BY APPLYING THE PLAIN-ERROR STANDARD TO PETITIONER'S CLAIM THAT THE MAGISTRATE JUDGE LACKED AUTHORITY TO CONDUCT JURY SELECTION.

The Court of Appeals erred by applying the plain-error standard of Federal Rule of Criminal Procedure 52(b) to Mr. Gonzalez's claim that the magistrate judge lacked authority to conduct jury selection.[35] Alternatively, even if Rule 52(b) were to apply, the Court of Appeals erred by finding no reversible plain error. There are several independent reasons why Mr. Gonzalez is entitled to relief on appeal, notwithstanding the fact that he raised his claim for the first time on appeal.

---

in Spanish) is not a mere "adjunct" to a trial judge as is true in this country but, instead, is an appellate judge who is superior vis-á-vis both state and federal trial judges. *See* Stephen Zamora, *et al.*, MEXICAN LAW 193-94, 204 (Oxford 2004). A Mexican citizen with knowledge of his own country's legal system being prosecuted in the United States' federal court system could not be expected to understand the difference between a United States "district" judge and "magistrate" judge without an explanation.

[35] After first applying the plain-error standard, the Court of Appeals proceeded to fully address the merits of Mr. Gonzalez's claim in the alternative. J.A. 31-33.

A. Because Mr. Gonzalez Did Not Have The Opportunity To Object To His Attorney's Purported Waiver Of His Right To An Article III Judge, Rule 52(b) Does Not Apply.

Federal Rule of Criminal Procedure 51(b) provides that "[a] party may preserve a claim of error by informing the court . . . of . . . the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). "If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." *Id.* In other words, Rule 52(b)'s plain-error standard does not apply if a party raising a claim for the first time on appeal did not have an opportunity to raise that claim in the district court; instead, in that situation, *de novo* review applies. *United States v. Schray*, 383 F.3d 430, 432 n.1 (6th Cir. 2004). Because Mr. Gonzalez did not have an opportunity to raise his invalid waiver claim in the district court, the plain-error standard does not apply on appeal.

If, as Mr. Gonzalez contends, a federal criminal defendant's right to have an Article III judge conduct jury selection is one of those "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988), then – based on the particular circumstances of Mr. Gonzalez's case – his lack of objection to the magistrate judge's failure to obtain his personal consent does not trigger Rule 52(b)'s plain-error standard. The

record demonstrates that, when the magistrate judge solicited consent from defense counsel and the prosecutor at the bench conference, Mr. Gonzalez was not present at the bench and, furthermore, did not have the assistance of an interpreter at that point. J.A. 15-17. Moreover, at no point does the record reflect that anyone thereafter informed Mr. Gonzalez that his counsel had consented and asked whether he also consented. Under these circumstances, Mr. Gonzalez never had a realistic opportunity to lodge an objection in the district court to the magistrate judge's conducting jury selection without his personal waiver.

That Mr. Gonzalez's trial counsel had the opportunity to object to the magistrate judge's failure to obtain Mr. Gonzalez's personal consent is beside the point: the essence of the claim on appeal is that *Mr. Gonzalez* never personally waived his right to an Article III judge and, additionally, that his attorney's purported consent outside of his presence was by itself legally insufficient. It thus would be illogical to say that counsel could forfeit an objection concerning a violation of Mr. Gonzalez's personal right if the law provides that "the attorney cannot waive [a federal defendant's right to an Article III judge] without the fully informed and publicly acknowledged consent of the client." *Taylor*, 484 U.S. at 417-28; *see also Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy & Souter, JJ.) ("Some rights may be forfeited by means short of waiver, . . .

but others may not [be forfeited by means short of waiver] . . . at least in the same proceeding.") (parentheses omitted). Therefore, trial counsel's lack of objection when the magistrate judge failed to obtain Mr. Gonzalez's personal waiver cannot be attributed to Mr. Gonzalez for purposes of Rule 52(b) and, under Rule 51(b), Mr. Gonzalez is entitled to *de novo* review of his claim that the magistrate judge lacked authority to conduct jury selection.[36]

---

[36] The record disposes of any suggestion that Mr. Gonzalez's trial counsel was engaging in improper "opportunistic" behavior by intentionally creating an error to raise on appeal. *Cf. Roell*, 538 U.S. at 590. The record demonstrates that, at the very outset of jury selection, the magistrate judge directed only the attorneys to approach the bench and solicited their consent without also asking whether Mr. Gonzalez personally consented. There is thus no indication that defense counsel did anything to invite or exploit the magistrate judge's error. *See also* R. 100 (in his motion to withdraw as Mr. Gonzalez's defense counsel after the trial was over, trial counsel suggested that there was no meritorious issue to be raised on appeal). Moreover, the rarity of what occurred in Mr. Gonzalez's case – defense counsel's consent given to the magistrate judge outside of the defendant's presence and hearing – militates against creating an error-preservation rule based on concerns of "gamesmanship." *See Nguyen v. United States*, 539 U.S. 69, 81 n.12 (2003) ("Countervailing concerns for gamesmanship, which animate the requirement for contemporaneous objection, therefore dissipate in these cases in light of the rarity of the improper panel assignment at issue.").

B. The Plain-Error Standard Cannot Be Applied To A Claimed Violation Of A Basic Right That Must Be Personally Waived By A Criminal Defendant When The Record Does Not Reflect An Adequate Waiver.

Even if Rule 51(b) does not apply, Rule 52(b)'s plain-error standard is inapplicable to a criminal defendant's claim, made for the first time on appeal, that a lower court judge failed to obtain a valid waiver of a "personal" and "basic" right. Rule 52(b)'s plain-error review, as this Court has held, embodies the concept of "forfeiture" rather than "waiver." *United States v. Olano*, 507 U.S. 725, 732-34 (1993). "Some rights may be forfeited by means short of waiver, . . . but others may not [be forfeited by means short of waiver] . . . at least in the same proceeding." *Freytag*, 501 U.S. at 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy & Souter, JJ.) (parentheses omitted). Therefore, if a right is of the type that *cannot* be forfeited by means short of a valid waiver, then a claim on appeal that such a right was violated – because the defendant did not validly waive the right in the district court – is not subject to Rule 52(b)'s strictures. *See Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring); *cf. United States v. Erskine*, 355 F.3d 1161, 1166-67 (9th Cir. 2004) (*de novo* review rather than the plain-error standard applies to a defendant's claim, made for first time on direct

appeal, that he did not validly waive his right to counsel in the district court).[37]

In his concurring opinion in *Freytag*, Justice Scalia gave two examples of rights that, if not properly "waived," are not subject to "forfeiture": the right to counsel and the right to a jury trial. 501 U.S. at 894 n.2. He cited the very same precedents[38] that this Court cited in *Hill*, *Taylor*, and *Schor* as examples of "basic" rights that, if waived, must be done *personally* by a defendant on the record. *See Hill*, 528 U.S. at 114-15 (citing *Johnson*, 304 U.S. at 464-65 (waiver of right to counsel)); *Taylor*, 484 U.S. at 417-18 & n.24 (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)

---

[37] In a like manner, the Court has implied that the strictures of Rule 52(b) would not apply to a defendant's constitutional claim made for the first time on appeal that he did not validly waive a personal right "when the record . . . contains no evidence that a defendant knew of the right[ ] he was putatively waiving." *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004) (contrasting claims of nonconstitutional violations of Rule 11 raised for the first time on appeal with constitutional violations under *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), and stating that reversal on appeal would occur if *Boykin*'s constitutional waiver rule was violated); *see also United States v. Vonn*, 535 U.S. 55, 79 n.7 (2002) (Stevens, J., concurring in part and dissenting in part) ("Assume a defendant states that he wishes to proceed *pro se*, and the trial judge makes no attempt to warn the defendant of the dangers and disadvantages of self-representation [as required by *Faretta v. California*, 422 U.S. 806 (1975)]. If the defendant makes no objection to the trial court's failure to warn, surely we would not impose a plain-error review standard upon this nonobjecting defendant.").

[38] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Patton v. United States*, 281 U.S. 276, 312 (1930).

(waiver of the right to jury trial));[39] *Schor*, 478 U.S. at 848-49 (citing *Duncan*, 391 U.S. at 158 & n.27, which in turn cited *Patton*, 281 U.S. at 312, concerning waiver of the right to jury trial). If the Court concludes that an effective waiver of a federal defendant's right to an Article III judge requires a defendant's express and personal waiver, then Rule 52(b) would not apply to Mr. Gonzalez's claim that he did not validly waive that right at jury selection because, without a valid waiver, he could not have forfeited the claim.

C. Applying The Plain-Error Standard Would Be Untenable Because The Very Nature Of Mr. Gonzalez's Claim Necessarily Means It Must Be Raised For The First Time On Appeal.

Application of the contemporaneous objection rule embodied in Rule 52(b) would be untenable in this case for yet another reason: the very nature of the Article III waiver issue raised by Mr. Gonzalez on appeal necessarily means that it was not raised in the district court and thus must be raised, if at all, for the first time on appeal. As Justice Scalia stated in his

---

[39] As discussed above, *Doughty* stands for the same proposition as *Patton*, which requires "the express and intelligent consent of the defendant [to proceed without a jury]" in order for a valid waiver to occur. *Patton*, 281 U.S. at 312.

dissenting opinion in *Peretz* (regarding a matter not addressed by the majority):[40]

> Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. . . . In my view, that course is appropriate here. Petitioner's principal claims are that the [FMA] does not allow a district court to assign felony *voir dire* to a magistrate even with the defendant's consent, and that in any event the consent here was ineffective because given orally by counsel and not in writing by the defendant. By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them, with the defendant's consent, to refer felony *voir dire* to a magistrate, and, if so, what form the consent must take. . . .

Peretz, 501 U.S. at 953-55 (Scalia, J., dissenting) (citations omitted); *cf. Freytag*, 501 U.S. at 879 (majority op.) ("It is true that, as a general matter, a

---

[40] The majority in *Peretz* did not even mention "plain error" or Rule 52(b) and, instead, rejected the petitioner's claim on the ground that he had waived his right to an Article III judge during jury selection by validly consenting to have the magistrate judge conduct *voir dire*. *See Peretz*, 501 U.S. at 924-40.

litigant must raise all issues and objections at trial. . . . We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981).[41]

For the reasons set forth by Justice Scalia in his dissenting opinion in *Peretz*, the Court should eschew application of Rule 52(b) in Mr. Gonzalez's case. However, Mr. Gonzalez's argument against application of the plain-error standard is even more compelling than the defendant's argument in *Peretz*. As explained above, unlike the defendant in *Peretz*, Mr. Gonzalez did not "plainly forfeit[] the right to advance his current challenges to the Magistrate's role."

---

[41] In *City of Newport*, a civil appeal, this Court stated:

> We undertake review here in order to resolve . . . the uncertainty [about the state of the law concerning punitive damages in civil rights cases], and it would scarcely be appropriate or just to confine our review to determining whether any error that might exist is sufficiently egregious to qualify under [the "plain error" standard applicable to forfeited claims in civil appeals]. The very novelty of the legal issue at stake counsels unconstricted review. In addition to being novel, the [legal] question is important and appears likely to recur. . . . [W]e conclude that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration.

City of Newport, 453 U.S. at 257.

Peretz, 501 U.S. at 953 (Scalia, J., dissenting). The defendant in *Peretz* was aware of his attorney's consent on his behalf and, indeed, the defendant personally consented, although that personal consent was communicated to the court through his attorney. *Peretz*, 501 U.S. at 925 & n.2. His claim on appeal essentially was that a more formal type of waiver or consent was required. *See id.* at 954 (Scalia, J., dissenting). In contrast, the record in Mr. Gonzalez's case demonstrates that he in no way personally waived the right to an Article III judge, either impliedly or expressly. Because the right to have an Article III judge conduct felony jury selection by definition cannot be "forfeited" short of a valid waiver, no forfeiture occurred in Mr. Gonzalez's case because no waiver occurred. *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment).

D. Application Of Rule 52(b) As A Procedural Bar To Mr. Gonzalez's Claim Would Serve No Legitimate Governmental Interest And Anomalously Would Impose Stricter Error-Preservation Requirements On Federal Defendants Than Those For Similarly Situated State Defendants.

Mr. Gonzalez has shown why application of Rule 52(b) would be illogical based on the nature of his Article III claim and the record in this case and, thus, would serve no legitimate governmental interest. In this regard, this Court repeatedly has held that a

state court's invocation of one of its procedural default rules will not be treated as an independent and adequate state law ground under 28 U.S.C. § 1257 on review of a state appeals court's judgment if application of the state's procedural rule serves no valid "state interest" in a particular case.[42] Because application of Rule 52(b) as a procedural bar in Mr. Gonzalez's case would serve no legitimate governmental interest, the Court should not apply it here. If this Court will not give jurisdictionally-preclusive effect to a state procedural bar on review of a state court judgment where the state's error-preservation rule serves no legitimate state interest, the Court likewise should refuse to give preclusive effect to a similar, non-jurisdictional[43] federal error-preservation rule that serves no governmental interest in a particular case. *See Kaufman v. United States*, 394 U.S. 217, 228 (1969) ("There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations."), *overruled*

---

[42] *James v. Kentucky*, 466 U.S. 341, 349 (1984); *cf. Lee v. Kemna*, 534 U.S. 362, 376-78 (2002) (following same approach to error preservation on federal habeas corpus review).

[43] Rule 52(b) – unlike 28 U.S.C. § 1257 – is not jurisdictional in nature. *United States v. Hayes*, 218 F.3d 615, 619-20 (6th Cir. 2000). Thus, this Court more readily can suspend its operation for good cause. *Cf.* Fed. R. Crim. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding [and] to secure . . . fairness in administration. . . .").

on other grounds, *Stone v. Powell*, 428 U.S. 465 (1976).

There is a second, related reason why application of Rule 52(b) as a procedural bar to Mr. Gonzalez's claim would create an anomalous situation, subjecting federal defendants to more stringent error-preservation requirements than similarly situated state defendants. This reason can best be explained by a hypothetical: Suppose a state defendant's attorney purported to waive his client's constitutional right to a jury trial[44] outside of the defendant's presence, and further suppose that the trial record in the case failed to show that the defendant himself knowingly waived that right. Finally, suppose that the defendant (represented by new counsel) for the first time on appeal contended that his conviction should be reversed because the record did not reflect that he had *personally* waived his right to a jury trial; however, the state appeals court applied its contemporaneous objection rule and refused to address the merits of the defendant's claim because it had not been raised in the trial court.

---

[44] As discussed above, *see supra* text at 27-29, the Sixth Amendment right to a jury trial (in a state or federal criminal case) is analogous to a federal defendant's right to an Article III judge in that both are "personal" and "basic" rights of defendants that must be waived in a knowing and voluntary manner by defendants themselves rather than unilaterally by defense counsel.

If this Court were to review the decision of the state appeals court, it would not treat the state court's procedural default ruling as an "independent and adequate state law ground" because the trial record would not establish that the defendant himself had given "express and intelligent consent." *Patton*, 281 U.S. at 312. In other words, because the federal question itself would be inextricably intertwined with the error-preservation issue, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."), the state court's procedural bar would not preclude *de novo* review by this Court. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."); *cf. Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (requiring, in the context of a guilty plea, that "the prosecution spread on the record the prerequisites of a valid waiver" of the fundamental rights that a defendant waives by pleading guilty, including the right to a jury trial; refusing, on review of a state court judgment, to "presume a waiver of these . . . important federal rights from a silent record").

If this Court would review *de novo* a state defendant's claim that he did not personally and expressly waive his right to a jury trial, then this Court should do the same on a federal direct appeal involving an

analogous claim that a federal defendant did not personally and explicitly waive his right to an Article III judge.

E. Even If The Court Were To Apply The Plain-Error Standard, Mr. Gonzalez Would Still Be Entitled To Reversal Of His Conviction.

Finally, even if the Court were to apply the plain-error standard, Mr. Gonzalez would still be entitled to a reversal of his conviction. In *Olano*, the Court set forth a four-pronged standard to apply in deciding whether a defendant who "forfeited" a claim is entitled to relief on appeal: whether (1) a "plain" (2) "error" occurred that (3) "affects substantial rights" of the defendant and that (4) "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." *Olano*, 507 U.S. at 733-36 (citations and internal quotation marks omitted). Mr. Gonzalez can satisfy all four prongs of the *Olano* standard.

First, the error in this case was plain under this Court's precedents discussed *supra* at pages 10-38. In particular, *Gomez* and *Peretz* establish that a magistrate judge does not have authority to conduct felony jury selection under the FMA unless a defendant gives valid "consent," which is another way of saying that a defendant must validly "waive" his right to an Article III judge. In addition, *Schor* states that a litigant's right to an Article III judge is a "personal" right and indicates that it must be waived as other such basic, personal rights are waived, *i.e.*, by the

litigant himself. *See Schor*, 478 U.S. at 848-49 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried.") (citing cases requiring the defendant's personal waiver of right to plead not guilty and right to jury trial); *see also Peretz*, 501 U.S. at 925 & n.2 (implicitly requiring defendant's knowing acquiescence in counsel's waiver of defendant's right to an Article III judge in order to accomplish a valid waiver). Because Mr. Gonzalez did not validly waive his right to an Article III judge, the magistrate judge lacked authority to conduct jury selection, and plain error occurred.

With respect to the third *Olano* factor, because nonconsensual delegation is structural error, as this Court held in *Gomez*, 490 U.S. at 876, this factor is satisfied. *See, e.g.*, *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004).[45] Finally, the Article III violation in this case is precisely the type that seriously affects the

---

[45] This Court has not yet decided whether a structural error satisfies *Olano*'s third factor. *See United States v. Cotton*, 535 U.S. 625, 632-33 (2002); *see also Olano*, 507 U.S. at 735 ("There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome.") (citing *Fulminante*, 499 U.S. at 310). However, the Courts of Appeals that have addressed the issue all have held that a structural error satisfies *Olano*'s third prong. *See Recio*, 371 F.3d at 1101 (citing decisions from Third and Fourth Circuits also holding that a structural error satisfies *Olano*'s third prong); *see also United States v. Barnett*, 398 F.3d 516, 526-27 (6th Cir. 2005) (citing cases).

fairness, integrity, and public reputation of the judicial proceedings. *See Schor*, 478 U.S. at 848 (stating that Article III serves both important "structural" interests as well as a litigant's "personal" interests). Therefore, because Mr. Gonzalez has shown reversible plain error, his conviction should be reversed.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed, and petitioner's case should be remanded for a new trial because he did not waive his right to have an Article III judge conduct jury selection.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
H. MICHAEL SOKOLOW
First Assistant Federal
Public Defender
TIMOTHY CROOKS
BRENT E. NEWTON*
Assistant Federal
Public Defenders
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634
(713) 718-4600
Brent_Newton@fd.org
Counsel for Petitioner
**Counsel of Record*

APPENDIX

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1.

* * *

[28 U.S.C.] § 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law –

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary–

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by

a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of

Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary –

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of

such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any

party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

28 U.S.C. § 636(a)-(c).

* * *

A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. . . .

Fed. R. Crim. P. 51(b); and

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52(b).

56100

60 pgs (5)

No. 06-11612

In the Supreme Court of the United States

HOMERO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a federal criminal defendant must explicitly and personally waive his right to have an Article III judge preside over *voir dire*.

2. Whether the court of appeals erred when it reviewed petitioner's objection for plain error.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Summary of argument 5
Argument:
I. A federal criminal defendant need not explicitly and personally consent to have a magistrate judge preside over *voir dire* 10
A. The Federal Magistrates Act authorizes a district court to delegate jury selection to a magistrate if the defendant consents to that delegation 10
B. Defense counsel may consent on behalf of a defendant to have a magistrate judge preside over *voir dire* 13
1. Under the Court's reasoning in *Peretz*, a defendant may consent through counsel to have a magistrate judge preside over *voir dire* 13
2. The decision whether to have an Article III judge or a magistrate judge conduct *voir dire* is a strategic decision entrusted to counsel 17
3. The record need not show that the defendant agreed with his counsel's actions 27
4. There is no basis for importing into 28 U.S.C. 636(b)(3) the consent procedures under 18 U.S.C. 3401(b) for a magistrate judge to preside over a misdemeanor trial 30

Table of Contents—Continued: Page

II. The court of appeals correctly reviewed petitioner's objection for plain error 32
A. Rule 52(b) applies to petitioner's improper delegation claim 33
B. Any error in having the magistrate judge preside over *voir dire* does not satisfy the requirements for plain error under Rule 52(b) 39
1. Any error in allowing the magistrate judge to supervise *voir dire* was not "plain" within the meaning of Rule 52(b) 40
2. Any error in the failure to obtain petitioner's explicit and personal consent did not affect petitioner's substantial rights 43
3. Any error in having the magistrate judge conduct *voir dire* did not seriously affect the fairness, integrity, or public reputation of judicial proceedings 48
Conclusion 51

TABLE OF AUTHORITIES

Cases:

Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942) 18
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 26
Bank of N.S. v. *United States*, 487 U.S. 250 (1988) 35
Boykin v. *Alabama*, 395 U.S. 238 (1968) 18, 46
CFTC. v. *Schor*, 478 U.S. 833 (1986) 24, 25

Cases—Continued: Page

Carnley v. *Cochran*, 369 U.S. 516 (1962) 46
Clark v. *Poulton*, 963 F.2d 1361 (10th Cir.), cert. denied, 506 U.S. 1014 (1992) 41
Coleman v. *Thompson*, 501 U.S. 722 (1991) 18
Estelle v. *Williams*, 425 U.S. 501(1976) 15, 19, 34, 50
Faretta v. *California*, 422 U.S. 806 (1975) 18, 19
Florida v. *Nixon*, 543 U.S. 175 (2004) 7, 18, 19, 20, 27
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 50
Gomez v. *United States*, 490 U.S. 858 (1989) ..... *passim*
Government of the V.I. v. *Williams*, 892 F.2d 305 (3d Cir. 1989), cert. denied, 495 U.S. 949 (1990) 16
Harris v. *Folk Constr. Co.*, 138 F.3d 365 (1998) 42
Henry v. *Mississippi*, 379 U.S. 443 (1965) 50
Hill v. *Lockhart*, 474 U.S. 52 (1985) 46
Hughes v. *United States*, 258 F.3d 453 (6th Cir. 2001) .. 23
Johnson v. *United States*, 520 U.S. 461 (1997) 9, 35, 38, 39, 40, 48
Jones v. *Barnes*, 463 U.S. 745 (1983) 18, 20
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 27
Levine v. *United States*, 362 U.S. 610 (1960) 15, 26
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 18
Luce v. *United States*, 469 U.S. 38 (1984) 49
Massaro v. *United States*, 538 U.S. 500 (2003) 20
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 24
Miller v. *Dormire*, 310 F.3d 600 (8th Cir. 2002) 47
Morse v. *Frederick*, 127 S. Ct. 2618 (2007) 38
Murray v. *Carter*, 477 U.S. 478 (1986) 18

Cases—Continued: Page

Nasca v. *Peoplesoft*, 160 F.3d 578 (9th Cir. 1998) 42
New York v. *Hill*, 528 U.S. 110 (2000) 5, 17, 18, 20, 25
Nguyen v. *Reynolds*, 131 F.3d 1340 (10th Cir. 1997), cert. denied, 525 U.S. 852 (1998) 23
Peguero v. *United States*, 526 U.S. 23 (1999) 35
Peretz v. *United States*, 501 U.S. 923 (1991) ..... *passim*
Reiter v. *Honeywell, Inc.*, 104 F.3d 1071 (8th Cir. 1997) 42
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 18, 46
Roell v. *Withrow*, 538 U.S. 580 (2003) 10, 32, 34, 50
Schneckcloth v. *Bustamonte*, 412 U.S. 218 (1973) 19
Siciliano v. *Vose*, 834 F.2d 29 (1st Cir. 1987) 28
Smith v. *Ayer*, 101 U.S. 320 (1879) 19
Strickland v. *Washington*, 466 U.S. 668 (1984) 20, 46
Taylor v. *Illinois*, 484 U.S. 400 (1988) 18, 20
Teague v. *Scott*, 60 F.3d 1167 (5th Cir. 1995) 23
Thomas v. *Arn*, 474 U.S. 140 (1985) 50
Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) 13
United States v. *Arnoldt*, 947 F.2d 1120 (4th Cir. 1991), cert. denied, 503 U.S. 983 (1992) 42
United States v. *Boyd*, 86 F.3d 719 (7th Cir. 1996), cert. denied, 520 U.S. 1231 (1997) 23, 29
United States v. *Cotton*, 535 U.S. 625 (2002) 27, 33, 48
United States v. *Desir*, 273 F.3d 39 (1st Cir. 2001) 41
United States v. *Dominguez Benitez*, 542 U.S. 74 (2004) 36, 43, 45, 47
United States v. *Frady*, 456 U.S. 152 (1982) 33

Cases—Continued: Page

United States v. *Gagnon*, 470 U.S. 522 (1985) 15, 34
United States v. *Gamba*, 483 F.3d 942 (9th Cir. 2007), petition for cert. pending, No. 07-6054 (filed Aug. 17, 2007) 14, 21, 43
United States v. *Gomez-Lepe*, 207 F.3d 623 (9th Cir. 2000) 42
United States v. *Joelson*, 7 F.3d 174 (9th Cir.), cert. denied, 510 U.S. 1019 (1983) 28
United States v. *Jones*, 938 F.2d 737 (7th Cir. 1991) 42
United States v. *Maragh*:
174 F.3d 1202 (11th Cir.), modified and petition for reh'g denied, 189 F.3d 1315 (11th Cir. 1999) 5
189 F.3d 1315 (11th Cir. 1999) 43
United States v. *Mechanik*, 475 U.S. 66 (1986) 39
United States v. *Olano*, 507 U.S. 725 (1993) ..... *passim*
United States v. *Ortiz*, 82 F.3d 1066 (D.C. Cir. 1996) ... 28
United States v. *Pennycooke*, 65 F.3d 9 (3d Cir. 1995) .. 28
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 33
United States v. *Vonn*, 535 U.S. 55 (2002) 8, 35, 36, 38, 43, 50
United States v. *Webber*, 208 F.3d 545 (6th Cir. 2000) ... 28
United States v. *Wey*, 895 F.2d 429 (7th Cir.), cert. denied, 497 U.S. 1029 (1990) 27
United States v. *Will*, 449 U.S. 200 (1980) 13
United States v. *Young*, 470 U.S. 1 (1985) 40, 49
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 20, 34
Wainwright v. *Witt*, 469 U.S. 412 (1985) 23

Cases—Continued: Page

Waller v. *Georgia*, 467 U.S. 39 (1984) 26
Yakus v. *United States*, 321 U.S. 414 (1944) 33

Constitution, statutes and rules:

U.S. Const.:
Art. III ..... *passim*
§ 1 12
Amend. VI 47
Federal Magistrates Act, 28 U.S.C. 631 *et seq.*:
28 U.S.C. 636 10
28 U.S.C. 636(a)(3) 11
28 U.S.C. 636(b)(1)(A) 10
28 U.S.C. 636(b)(1)(B) 10
28 U.S.C. 636(b)(2) 10
28 U.S.C. 636(b)(3) 6, 11
28 U.S.C. 636(c)(1) 10, 31
Interstate Agreement on Detainers Act, 18 U.S.C. App. 1 *et seq.* at 1520 (2000) 20
18 U.S.C 2 2
18 U.S.C. 3231 27
18 U.S.C. 3401(b) 7, 11, 30, 31
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b)(1)(A) 1
21 U.S.C. 841(b)(1)(B) 2
21 U.S.C. 846 1
28 U.S.C. 2255 45
Fed. R. Civ. P. 53(b) 10

Rules—Continued: Page

Fed. R. Crim. P.:
Rule 11 ..... 36, 38, 45
Rule 24(c) 38
Rule 51(b) 8, 33, 34
Rule 52(a) 43
Rule 52(b) ..... *passim*

Miscellaneous:

ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993) 23
H.R. Rep. No. 1609, 94th Cong., 2d Sess. (1976) 12

In the Supreme Court of the United States

No. 06-11612

HOMERO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 24-33) is reported at 483 F.3d 390.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2007. The petition for a writ of certiorari was filed on May 24, 2007, and was granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to possess more than 1,000 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A) and 846, and

four counts of aiding and abetting the possession of more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 4. The court of appeals affirmed. J.A 24-33.

1. Petitioner was a high-level member of a narcotics trafficking organization based in Laredo, Texas, that was responsible for the transportation of thousands of kilograms of marijuana from Mexico to various destinations in the United States. Drugs from Mexico were delivered to warehouses in Laredo, where they were loaded onto trailers with commercial products for transportation to points north. Petitioner and others were responsible for preparing one warehouse to receive the marijuana loads and arranging for the marijuana to be loaded onto trailers and transported out. Petitioner helped to traffic more than 2,600 kilograms of marijuana. Presentence Investigation Report ¶¶ 8-35.

2. A federal grand jury in the United States District Court for the Southern District of Texas charged petitioner with conspiracy and aiding and abetting offenses. His initial appearance, detention hearing, and arraignment took place before United States Magistrate Judge Adriana Arce-Flores. Petitioner pleaded not guilty and elected to be tried by a jury. United States District Court Judge George P. Kazen handled four pretrial conferences. Gov't C.A. Br. 2-3.

On January 21, 2005, petitioner and his counsel appeared before Magistrate Judge Arce-Flores for jury selection. At the beginning of the process, the magistrate judge called the attorneys to the bench and asked both parties "if they are going to consent to having the

United States Magistrate Judge proceed in assisting in the jury selection of this case." J.A. 16. Counsel for the government responded: "Yes, we are, your Honor." *Ibid.* Petitioner's counsel also responded: "Yes, your Honor, we are." *Ibid.* The magistrate judge then stated: "The parties have agreed through consent that this Court will be assisting through the process of jury selection." *Ibid.* The magistrate judge did not ask petitioner directly whether he consented to having a magistrate judge perform jury selection, and petitioner did not execute a written consent. *Ibid.*

The magistrate judge asked whether petitioner required the assistance of a translator "at this time." J.A. 16. The record shows that a translator was present in court. J.A. 15. Petitioner's counsel responded: "Yes he does, your Honor." J.A. 16. After a pause in the proceedings, the magistrate judge then introduced herself: "I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process." J.A. 17.[1]

Voir dire proceeded without incident or objection by petitioner. The magistrate judge provided the parties and venire members with a detailed explanation of the jury selection process. She permitted the parties to make statements to the venire members and to frame and ask their own series of questions. The magistrate judge also questioned venire members personally. All prospective jurors excused for cause were excused ei-

---

[1] Because the record shows no further pause in the proceedings from the time the magistrate judge introduced herself to the jury panel until individual questioning of panel members commenced, the natural inference is that petitioner had the assistance of an interpreter at the time the magistrate judge introduced herself and announced that she would be conducting the jury selection process.

ther at defense counsel's request or without objection by defense counsel. Gov't C.A. Br. 7-8; J.A. 17-23; 1/21/05 Tr. 10-11, 13-15, 63-64, 71.

3. United States District Court Judge Adrian G. Duplantier presided over petitioner's trial. Petitioner made no objection to the magistrate judge's having conducted *voir dire* and did not ask the district judge to review any ruling or other action taken by the magistrate judge. The jury found petitioner guilty of all counts. J.A. 26. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 4.

4. The court of appeals affirmed, rejecting petitioner's claim that the district court erred in delegating *voir dire* to a magistrate judge without petitioner's express personal consent. J.A. 24-33. Because petitioner had failed to object to the delegation before the district court, the court of appeals reviewed for plain error. J.A. 26. The court noted, however, that it found petitioner's argument unpersuasive even "under a less stringent standard." J.A. 31.

The court of appeals held counsel may consent to have a magistrate judge preside over *voir dire*. J.A. 27-29. It noted that, under this Court's decision in *Peretz* v. *United States*, 501 U.S. 923, 940 (1991), jury selection may be delegated to a magistrate judge in the absence of an objection by the defendant. J.A. 27. The court reasoned that "[t]he fact pattern in *Peretz*, in which the delegation was found to be permissible, is almost identical to that in the instant case," and it concluded that *Peretz* contains "no indication" that this Court found "the absence of specific consent by the defendant to be a dispositive, or even relevant consideration." J.A. 31.

The court of appeals acknowledged (J.A. 31-32) that one appellate decision had reached the opposite conclusion, see *United States* v. *Maragh*, 174 F.3d 1202 (11th Cir.), modified and petition for reh'g denied, 189 F.3d 1315 (11th Cir. 1999) (per curiam), and observed that the debate among other courts of appeals "appears to turn on whether affirmative consent is required at all, not on what form this consent must take." J.A. 32. The court declined to follow *Maragh*, noting that "[w]hat suffices for a waiver depends on the nature of the right at issue," *ibid.* (quoting *New York* v. *Hill*, 528 U.S. 110, 114 (2000)), and that the right to have an Article III judge conduct *voir dire* is even more "limited" than other rights that can be waived by counsel, J.A. 32. Having determined that the right to have an Article III judge preside at *voir dire* is not so fundamental that it must be waived personally, the court of appeals found no error and affirmed the judgment of the district court. J.A. 33.

SUMMARY OF ARGUMENT

Neither the Federal Magistrates Act nor the Constitution requires that a defendant provide an explicit and personal waiver of the right to have an Article III judge preside over *voir dire* in a criminal trial. An expression of consent by counsel is all that is required to satisfy the statute, the Constitution, and this Court's decisions. Even if there were error, petitioner's claim would be reviewable only for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure because of his failure to object in the trial court. Petitioner cannot show that his forfeited claim implicates any error, let alone error that is "obvious," affects his substantial rights, or seriously affects the fairness, integrity, or public reputation of judicial proceedings.

I. A. The Federal Magistrates Act, 28 U.S.C. 636(b)(3), permits a magistrate judge to be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3). In *Gomez* v. *United States*, 490 U.S. 858 (1989), this Court held that Section 636(b)(3) does not permit a magistrate judge to supervise *voir dire* over the defendant's objection. The Court subsequently held in *Peretz* v. *United States*, 501 U.S. 923 (1991), that Section 636(b)(3) authorizes the magistrate judge to preside over *voir dire* with the parties' consent. Both of those decisions assumed, without deciding, that a defendant has a constitutional right to have an Article III judge preside over *voir dire*. *Id.* at 929.

B. 1. The reasoning of *Peretz* forecloses the view that a defendant must personally and explicitly waive his right to have an Article III judge supervise jury selection. The defendant in *Peretz* did not execute an explicit and personal consent to the magistrate role, and the Court did not adopt the view of the three dissenting Justices who would have held that personal, written consent was required. 501 U.S. at 947 n.6 (Marshall, J., dissenting). Moreover, the Court in *Peretz* confined *Gomez* to cases in which a defendant objects to the magistrate judge's role in jury selection and held that, absent such an objection, the defendant has no right under the Constitution or the Federal Magistrates Act to have an Article III judge conduct *voir dire*. *Id.* at 928, 933-935, 936, 937, 940. *A fortiori*, there is no error where defense counsel expressly consents to have the magistrate judge preside over *voir dire*.

2. Even if *Peretz* were thought to leave the question open, this Court's precedents make clear that a requirement of an explicit and personal waiver by the defendant

is unwarranted. Such a requirement is limited to those fundamental rights, such as the right to plead not guilty and the right to counsel, that have such sweeping implications for the accused that he alone must knowingly and intelligently relinquish his rights. For less fundamentally important rights, defense counsel speaks for the defendant and is entrusted to make tactical and strategic decisions on the defendant's behalf.

The decision whether to consent to have a magistrate judge or an Article III judge preside over *voir dire* is a strategic decision within the realm of counsel's expertise. Counsel is uniquely suited to determine whether a magistrate judge's style, practice, and procedures in supervising *voir dire* will advance his client's interest in picking a favorable jury in a particular case. Indeed, counsel is entrusted with critical decisions during *voir dire* such as when and whether to strike jurors for cause or to exercise peremptory challenges and how to question prospective jurors when permitted by the judge. It would be incongruous to cede those decisions to counsel but hold that only the defendant can waive an Article III judge at jury selection.

3. Nor is it necessary for counsel to represent to the court that he has his client's concurrence when he makes a strategic decision that the magistrate judge, rather than an Article III judge, will advance the defendant's interests in securing a favorable jury. The nature of the attorney-client relationship presumes that counsel has discussed overarching defense strategy with his client and that counsel will otherwise zealously represent his client as counsel deems best. See, *e.g.*, *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004).

4. There is no basis for requiring courts to follow the personal, written consent requirements of 18 U.S.C.

3401(b), which apply before a magistrate judge may conduct federal misdemeanor trials. The Court in *Peretz* did not adopt those requirements despite the urging of three dissenting Justices. 501 U.S. at 947 n.6 (Marshall, J., dissenting). Congress deemed those procedures appropriate when the magistrate judge is to preside over the entire trial and sentencing proceeding, and to enter judgment in the case. There is no reason to think that Congress would have wanted to impose a similar requirement for counsel's strategic decision to have the magistrate judge preside over only one limited part of a felony proceeding—jury selection.

II. A. Because petitioner did not object at trial to the role of the magistrate judge during jury selection, the court of appeals correctly reviewed petitioner's objection for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. None of the four justifications that petitioner advances for ignoring application of plain-error review has merit. First, the parties had the opportunity to object to the magistrate judge's role within the meaning of Federal Rule of Criminal Procedure 51(b). Second, plain-error review applies to a claim that a represented defendant did not validly waive his personal rights. *United States* v. *Vonn*, 535 U.S. 55 (2002). Third, plain-error review applies even though, had petitioner timely objected to the magistrate judge's role, an Article III judge would have presided over jury selection; indeed, the whole point of requiring parties to make a contemporaneous objection is to permit the trial court to cure the error and remove the issue as a basis for appeal. Fourth, Rule 52(b) applies to claims that are procedurally defaulted in federal criminal cases regardless of this Court's precedents concerning review of

state court judgments. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997).

B. Petitioner has not established that he entitled to a new trial under plain-error review. Even assuming that it was error to delegate jury selection to the magistrate judge with defense counsel's consent, but without the defendant's explicit and personal consent, relief would be unwarranted in this case. The error was far from "plain," Fed. R. Crim. P. 52(b), given this Court's reasoning in *Peretz* that a defendant has no right to an Article III judge during *voir dire* absent a demand for one, and given that a majority of the courts of appeals had held that a magistrate judge could preside over *voir dire* with defense counsel's consent.

Nor has petitioner shown that any error affected petitioner's "substantial rights." Fed. R. Crim. P. 52(b). Although *Gomez* held that harmless-error analysis does not apply when a magistrate judge supervises jury selection over a defendant's objection, the alleged error is not equivalent to *Gomez*. In contrast to the objection by counsel in *Gomez*, petitioner's counsel embraced the magistrate judge's offer to conduct *voir dire*, presumably because he thought such action would *benefit* the defense. There is no reason to assume that petitioner disagreed. In those circumstances, the relevant inquiry does not focus on what would have happened if the magistrate judge had not conducted *voir dire*, but rather on whether the magistrate judge would have conducted *voir dire* if petitioner had been asked for his personal consent.

In all events, any error did not seriously affect the fairness, integrity or public reputation of judicial proceedings. Jury selection proceeded in this case without incident, and the magistrate judge presided over *voir*

dire only after obtaining defense counsel's explicit consent on the issue. To provide relief in this case would give defendants the incentive to inject error into the proceedings, thereby giving them the unjustified "luxury of waiting for the outcome before denying the magistrate judge's authority." *Roell* v. *Withrow*, 538 U.S. 580, 590 (2003).

ARGUMENT

I. A FEDERAL CRIMINAL DEFENDANT NEED NOT EXPLICITLY AND PERSONALLY CONSENT TO HAVE A MAGISTRATE JUDGE PRESIDE OVER *VOIR DIRE*

A. The Federal Magistrates Act Authorizes A District Court To Delegate Jury Selection To A Magistrate If The Defendant Consents To That Delegation

The Federal Magistrates Act, 28 U.S.C. 636, outlines the powers and duties of magistrate judges. Section 636(b)(1)(A) provides that "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court."[2] Magistrate judges may also conduct jury or nonjury civil matters, or serve as a special master in a civil case without regard to the limitations of Rule 53(b) of the Federal Rules of Civil Procedure, "upon consent of the parties," 28 U.S.C. 636(b)(2) and (c)(1), and may conduct misdemeanor trials, with or without a jury, upon "express[] consent" in

---

[2] While Section 636(b)(1)(A) excepts from such delegable authority a variety of pretrial duties (such as motions for injunctive relief, for judgment on the pleadings, to dismiss or quash an indictment, and to suppress evidence in a criminal case), Section 636(b)(1)(B) permits a judge to designate a magistrate judge to "conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition" of such excepted motions.

writing or orally on the record, 28 U.S.C. 636(a)(3); 18 U.S.C. 3401(b). Section 636(b)(3) provides that "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

In *Gomez* v. *United States*, 490 U.S. 858 (1989), this Court held that the "additional duties" that may be delegated to a magistrate judge under Section 636(b)(3) do not encompass the selection of a jury in a felony trial over the defendant's objection. *Id.* at 872. The Court's conclusion was influenced by the "substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial." *Peretz* v. *United States*, 501 U.S. 923, 929 (1991). That question led the Court to look for clear evidence that Congress intended the general grant of authority in Section 636(b)(3) to authorize a procedure that "deprived a defendant of an important privilege, if not a right." *Id.* at 930.

The Court in *Gomez* found no such intent, explaining that the Act's "carefully defined grant of authority [to magistrates] to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." 490 U.S. at 872. In addition, the Court noted that the Act contains no provisions for court review of a magistrate judge's decision during jury selection; the Court concluded that "it is unlikely that [Congress] intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review." *Id.* at 873. The Court also held that the delegation of *voir dire* to a magistrate judge, "despite the defendant's objection," cannot be harmless error. *Id.* at 876.

Two years later, in *Peretz*, the Court held that the Act permits a magistrate judge to supervise *voir dire* with the consent of the parties. In *Peretz*, the district court judge asked at a pretrial conference whether there was "[a]ny objection to picking the jury before a magistrate." 501 U.S. at 925. The defendant's counsel responded: "I would love the opportunity." *Ibid.* Before jury selection began, the magistrate judge again requested "assurances from counsel for [the defendant] and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection." *Ibid.* Counsel for the defendant responded: "Yes, your Honor." *Id.* at 925 n.2.

The Court held that "supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent." *Peretz*, 501 U.S. at 935. The Court noted that the Act allows the district court with the parties' consent to delegate to a magistrate judge the supervision of entire civil and misdemeanor trials. Those duties, the Court concluded, were "comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Id.* at 933. The Court further explained that its reading of the Act's "additional duties" clause "strikes the balance Congress intended between the interests of the criminal defendant and the policies that undergird the Federal Magistrates Act," and will allow the courts "to 'continue innovative experimentations' in the use of magistrates to improve the efficient administration of the courts' dockets." *Id.* at 933-934 (quoting H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976)).

The Court acknowledged that Article III, Section 1 "serves both to protect 'the role of the independent

judiciary within the constitutional scheme of tripartite government' * * * and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Peretz*, 501 U.S. at 929 n.6 (quoting *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985), and *United States* v. *Will*, 449 U.S. 200, 218 (1980)). The Court explained, however, that because the ultimate decision whether to empanel the jury remains in the hands of the district court judge, the right to have an Article III judge preside over jury selection does not fall within any category of "structural protections" that litigants cannot waive: "Because the entire process takes place under the district court's total control and jurisdiction, there is no danger that use of the magistrate involves a congressional attempt[] to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts." *Id.* at 938 (internal quotation marks and citations omitted).

B. Defense Counsel May Consent On Behalf Of A Defendant To Have A Magistrate Judge Preside Over *Voir Dire*

1. *Under the Court's reasoning in* Peretz, *a defendant may consent through counsel to have a magistrate judge preside over* voir dire

The reasoning of this Court's decision in *Peretz* refutes the contention that a defendant must personally and explicitly waive his right to have an Article III judge preside over *voir dire*. In holding that a magistrate judge could supervise *voir dire* with the parties' consent, the Court found it "critical[]" in distinguishing *Gomez* that the defendant's "*counsel*, rather than objecting to the Magistrate's role, affirmatively welcomed it." *Peretz*, 501 U.S. at 932 (emphasis added). As the

court of appeals recognized, "there is no indication [in *Peretz*] that the Court found the absence of specific consent *by the defendant* to be a dispositive, or even relevant consideration." J.A. 31 (emphasis added); see *United States* v. *Gamba*, 483 F.3d 942, 948-949 (9th Cir. 2007) (observing that "there is no express indication in *Peretz* that the defendant ever *personally* consented to the magistrate's presence" and that the Court "by no means required it"), petition for cert. pending, No. 07-6054 (filed Aug. 17, 2007). Indeed, the Court did not adopt the view of three dissenting Justices that counsel's consent was insufficient because the defendant had not given personal written consent to the magistrate judge's role. *Peretz*, 501 U.S. at 947 (Marshall, J., dissenting). Similarly, the Court expressed its "confiden[ce] * * * that *defense counsel* can sensibly balance [the relevant] considerations in deciding whether to object to a magistrate's supervision of *voir dire*." *Id.* at 935 n.12 (emphasis added).

Peretz also makes clear that neither the Constitution nor the statute mandates that a defendant personally consent to a magistrate judge's presiding over *voir dire*. Although the facts in *Peretz* involved the consent of counsel, the Court more broadly concluded that, absent a specific demand by the defense that an Article III judge preside over jury selection, neither the Constitution nor the Act is offended when a magistrate judge conducts *voir dire*. The decision repeatedly stated that a defendant has no constitutional right to have an Article III judge supervise *voir dire* absent an objection or demand by the defense. 501 U.S. at 936 ("a defendant has no constitutional right to have an Article III judge preside at jury selection *if the defendant has raised no objection to the judge's absence*") (emphasis added); *id.*

at 937 ("Just as the Constitution affords no protection to a defendant who waives * * * fundamental rights, so it gives no assistance *to a defendant who fails to demand the presence of an Article III judge* at the selection of his jury.") (emphasis added); *id.* at 940 (allowing a magistrate judge to conduct *voir dire* in a felony trial "when the defendant raises no objection" fully accords with the Federal Magistrates Act).[3]

Petitioner argues that those conclusions must be read in light of the fact that the counsel in *Peretz* represented that his client agreed to have a magistrate judge preside over *voir dire* and in any event conflict with the principle that a right can be waived only knowingly and intelligently. Br. 22-24. The quoted statements, however, were critical to the Court's disposition of the case. The Court explained that it had no occasion to decide whether Peretz had waived his claim of error, because it found no constitutional or statutory error at all. Instead, the Court stated, "[w]e agree with the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the *voir dire* in a felony trial *when the defendant raises no objection* is entirely faithful to

---

[3] In other contexts as well, this Court has held that a right may be lost if not affirmatively asserted by the defendant. See, *e.g.*, *United States* v. *Gagnon*, 470 U.S. 522, 528-529 (1985) (per curiam) (no right to be present at all stages of a criminal trial absent a defense objection); *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (no right to public trial absent a defense request for one); *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1974) ("[A]lthough the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."); *Peretz*, 501 U.S. at 936 (citing cases).

the congressional purpose in enacting and amending the Federal Magistrates Act." *Peretz*, 501 U.S. at 940 (emphasis added).

Similarly, the Court in *Peretz* elsewhere reiterated that there is no error under *Gomez* in the absence of compulsion, *i.e.*, unless the defendant objects to having a magistrate judge supervise jury selection and his objection is rejected. 501 U.S. at 933 (endorsing the view of those courts of appeals that had "concluded that the rationale of [*Gomez*] does not apply if *the defendant has not objected* to the magistrate's conduct of the *voir dire*.") (emphasis added); *id.* at 928 (observing that before *Gomez*, "courts had uniformly rejected challenges to a magistrate's authority to conduct the *voir dire* when *no objection to his performance of the duty had been raised* in the trial court.") (emphasis added); *id.* at 934-935 ("Where * * * the defendant is *indifferent* as to whether a magistrate or a judge should preside, then it makes little sense to deny the district court the opportunity to delegate that function to a magistrate, particularly if such a delegation sensibly advances the court's interest in the efficient regulation of its docket.") (quoting *Government of the V.I.* v. *Williams*, 892 F.2d 305, 311 (3d Cir. 1989), cert. denied, 495 U.S. 949 (1990)) (emphasis added). And three dissenting Justices likewise viewed the majority's opinion as "creating authority for magistrates to preside over a 'critical stage' of the felony trial * * * *merely because a defendant fails to request a judge*." *Id.* at 948 (Marshall, J., dissenting) (quoting *Gomez*, 490 U.S. at 873) (emphasis added).

Petitioner thus errs in arguing that the Federal Magistrates Act must be read to require the defendant's explicit and personal consent in order to avoid the "serious constitutional question" that would arise if counsel on

behalf of the defense could consent to *voir dire* by a magistrate judge. Pet. Br. 13-21, 31-32; see NACDL Amicus Br. 8-13, 34. The only constitutional question left open after *Gomez* and *Peretz* is whether "a defendant in a criminal trial has a constitutional right to demand the presence of an Article III judge at *voir dire*." 501 U.S. at 936; accord *id.* at 929. Even assuming he has such a right, this Court already has concluded that a defendant has neither a constitutional nor statutory right to have an Article III judge conduct *voir dire* absent his demand for one (by objecting to the magistrate judge's presiding). *A fortiori*, there is no error at all when defense counsel affirmatively consents to having a magistrate judge conduct jury selection.

2. The decision whether to have an Article III judge or a magistrate judge conduct* voir dire *is a strategic decision entrusted to counsel

Even if this Court's reasoning in *Peretz* does not foreclose the argument that the defendant must explicitly and personally consent to have a magistrate conduct *voir dire*, this Court should conclude that counsel's consent is sufficient as a matter of first principles. The conditions under which a right may be waived depend on the nature of the right itself. *New York* v. *Hill*, 528 U.S. 110, 114 (2000). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

This Court has recognized only a limited class of fundamental rights that "are of such moment" for the ac-

cused that the defendant must give personal and informed consent before a waiver is valid. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Hill*, 528 U.S. at 114 ("For certain fundamental rights, the defendant must personally make an informed waiver."). Those rights include the right to plead not guilty and go to trial, *Boykin* v. *Alabama*, 395 U.S. 238 (1969), the right to a jury, *Taylor* v. *Illinois*, 484 U.S. 400, 418 n.24 (1988); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942), and the right to counsel, *Faretta* v. *California*, 422 U.S. 806 (1975); see *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). For certain other important rights, such as the right to appeal and the right to testify, the accused retains control over the ultimate decision, *ibid.*, but the Constitution does not require an on-the-record explicit and personal waiver.[4]

Outside of these narrowly confined contexts in which a personal waiver is demanded, a represented defendant generally speaks through counsel who, as the defendant's agent, has the power to make decisions that bind the defendant. Absent the ineffective assistance of counsel, "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, and the [defendant] must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray* v. *Carter*, 477 U.S. 478, 488 (1986)); accord *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (observing that our judicial system is based on "representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have

---

[4] See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 476-481 (2000) (examining counsel's failure to file a notice of appeal under ineffective assistance standards); p. 28, *infra* (defendant can waive the right to testify without any personal colloquy with the trial judge).

'notice of all facts, notice of which can be charged upon the attorney'") (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1880)).

Petitioner thus errs in asserting that the concept of a waiver inherently requires, "at minimum," a knowing and intelligent decision *by the accused*. Br. 31. Counsel is not constitutionally required to secure his client's personal informed consent before making the numerous strategic and tactical decisions that effect a binding waiver of his client's rights. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckcloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973). This Court therefore has not required a "showing of conscious surrender of a known right * * * with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976); see *Olano*, 507 U.S. at 733.

While an attorney "has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy," that obligation "does not require counsel to obtain the defendant's consent to every tactical decision." *Nixon*, 543 U.S. at 187 (internal quotation marks and citations omitted); *Faretta*, 422 U.S. at 820 ("law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas").

In *Taylor*, the Court summarized and endorsed those principles in rejecting a Compulsory Process claim that the trial court had acted improperly in excluding a defense witness as a sanction for counsel's violation of discovery rules. In dismissing the argument that "it is un-

fair to visit the sins of the lawyer upon his client," 484 U.S. at 416, the Court explained:

> [T]he lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. * * * Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.

Id. at 418; see *Nixon*, 543 U.S. at 187-189 (counsel, after consultation with client, may concede guilt in capital sentencing proceeding without defendant's explicit and personal consent); *Hill*, 528 U.S. at 115 (counsel is entrusted to consent to a trial date beyond time limit required by the Interstate Agreement on Detainers Act, 18 U.S.C. App. 1 *et seq.* at 1520 (2000)); *Barnes*, 463 U.S. at 751 (counsel is entrusted to determine which issues will be pressed on appeal); accord *Wainwright* v. *Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). In short, unless counsel is shown to have acted ineffectively, "counsel's word on such matters is the last." *Hill*, 528 U.S. at 115.[5]

The decision of which neutral judicial officer should preside over one stage of the criminal proceeding—the selection of the jury—is not the sort of fundamental de-

---

[5] Petitioner has not alleged that his counsel, in consenting to the magistrate judge's role, provided ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and any such claim would ordinarily be raised on collateral review, *Massaro* v. *United States*, 538 U.S. 500, 504-509 (2003).

cision that the defendant alone must make and that must be protected by having the court personally address the defendant. That decision does not have the same pervasive impact on the defendant as the decisions to forego counsel, to plead guilty, or to have a jury decide the defendant's factual guilt or innocence. Those decisions have profound consequences for the defendant and may fundamentally alter his fate. The same cannot be said of the decision to permit a magistrate judge to preside over *voir dire*. Magistrate judges are not inherently unfit to preside over jury selection and nothing suggests that a jury chosen by a magistrate judge is likely to be less fair than one selected by a district court. On the contrary, the Court has noted that the Federal Magistrates Act "evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection." *Peretz*, 501 U.S. at 935; *Gomez*, 490 U.S. at 869 ("congressional concerns regarding magistrates' abilities had decreased" since the first version of the Federal Magistrates Act was enacted).

Significantly, the strategic and tactical considerations that inform the decision whether to agree to have a magistrate judge conduct *voir dire* in a felony criminal case are peculiarly within the realm of counsel's expertise, and are matters as to which the defendant ordinarily would be expected to defer to counsel. *Peretz*, 501 U.S. at 935 n.12 (observing that a magistrate judge's performance of jury selection "may be difficult for a judge to review with infallible accuracy" but expressing confidence "that *defense counsel* can sensibly balance these considerations against other concerns in deciding whether to object to a magistrate's supervision of *voir dire*") (emphasis added); cf. *Gamba*, 483 F.3d at 947-948 (holding that counsel's decision to consent to having a

magistrate judge preside over closing argument was a technical and strategic legal decision entrusted to counsel).

For a number of tactical reasons, counsel may prefer to have a magistrate judge, rather than an Article III judge, conduct *voir dire*. He may know that a particular magistrate judge permits defense counsel to address or question prospective jurors, while the district judge may not. See J.A. 20 (magistrate judge's advising the parties that "I let the attorneys handle the voir dire."). Counsel may know that the magistrate judge would be likely to conduct a more thorough inquiry than a district judge, who might be diverted by other matters, or that the magistrate judge's view of qualified jurors is more favorable to the defendant than the district judge's view, and thus that he might be more willing than a district judge to grant for-cause challenges. And in this case, because petitioner may have had a favorable experience when he previously appeared before Magistrate Judge Arce-Flores, p. 2, *supra*, counsel may have formed the judgment that she would effectively preside over *voir dire*. Indeed, in light of the undisputed reality that magistrate judges may handle *voir dire*, the choice between which neutral judicial officer will conduct *voir dire* is analogous to a choice whether to seek reassignment of a case to another judge and to the decision as the best forum for filing a civil case, which are classic matters for the attorney's judgment and as to which an insistence of a personal waiver would be wholly inapposite.

Those strategic questions are quintessentially ones for defense counsel to make, based on matters lying squarely within his area of expertise. They are questions as to which a defendant would almost certainly defer to the judgment of counsel. And, indeed, counsel

could reasonably conclude that an exposition to his client about his right to demand an Article III judge would not fruitfully advance the decision whether or not to allow the magistrate judge to conduct *voir dire*. *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* standard 4-5.2 commentary at 202 (3d ed. 1993) ("Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and any explanation to any but the most sophisticated client would be futile.").

Petitioner errs in asserting (Br. 18-19) that, in light of the importance of jury selection in a felony criminal trial, this Court should preclude counsel from consenting to a magistrate judge's presiding over *voir dire* on behalf of his client. Despite the importance of jury selection, counsel routinely decide during *voir dire* whether to exercise or waive a myriad of rights that directly affect the composition of the jury and its initial views of the case. The decisions whether and when to exercise peremptory strikes and to challenge jurors for cause are tactical and strategic decisions that are "entrusted to counsel rather than to defendants personally." *United States* v. *Boyd*, 86 F.3d 719, 723 (7th Cir. 1996), cert. denied, 520 U.S. 1231 (1997); see *Hughes* v. *United States*, 258 F.3d 453, 457 (6th Cir. 2001); *Nguyen* v. *Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997), cert. denied, 525 U.S. 852 (1998); *Teague* v. *Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995); cf. *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit, without personal consent, the right not to have members of the venire excluded because of their attitudes toward capital punishment).

A court has no *sua sponte* duty to question the defendant to ensure that he agrees with counsel's decisions on whether and how to question certain jurors as to their views. *McKaskle* v. *Wiggins*, 465 U.S. 168, 183 (1984) (defendant has no constitutional right to a "hybrid" defense team, consisting of himself and his lawyer making decisions by turns). Indeed, it would be an inappropriate intrusion into the attorney-client relationship for the judge to invite open discussion about whether a defendant concurs with his counsel's jury selection decisions and *voir dire* tactics. In view of that predominant role of counsel in jury selection tactics, it would make little sense to deny trial counsel the authority to decide which neutral judicial officer would best advance the defense interests in the supervision of *voir dire*.[6]

Petitioner argues (Br. 28-30) that this Court in *CFTC* v. *Schor*, 478 U.S. 833 (1986), equated the right to an Article III judge with the right to jury trial or the right to plead not guilty when the Court stated "as a personal right, Article III's guarantee of an impartial

---

[6] Petitioner's amici argue that counsel's consent alone should be insufficient because they surmise that counsel will have improper incentives to consent to the magistrate judge's role. Amici suggest that counsel may want to curry favor with both the magistrate judge and the referring trial judge and that the magistrate judge may conduct jury selection in a way that saves counsel time and money. NACDL Amicus Br. 31-33; Houston Inst. Amicus Br. 25-26. There is no basis, however, for assuming that judges would harbor more ill-will towards counsel who object to the magistrate judge's role on the defendant's behalf than they would towards counsel whose client personally objects to the magistrate judge's role, or, for that matter, towards counsel who object to any other decision or request by a judge. In any event, there is no basis for fashioning a constitutional rule based on speculation that counsel would subsume his client's interests in favor of counsel's personal or pecuniary interests.

and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848-849. To the extent that the Court equated the rights it mentioned, *Schor* did not involve the right to have jury selection conducted by an Article III judge but rather a civil litigant's right to an adjudication by an Article III tribunal instead of the Commodities Futures Trading Commission (CFTC). In any event, the fact that a right is "personal" does not mean, as suggested by petitioner (Br. 29), that it requires an explicit and personal waiver by a party; rather it means the right is subject to waiver in the first place (as opposed to a non-waivable structural guaranty). See, *e.g.*, *Hill*, 528 U.S. at 116-118. Finally, *Schor* itself did not require an explicit and personal waiver of Article III rights by the party, as the Court made clear that waiver could be expressed or implied by the party's actions in appearing before the CFTC. 478 U.S. at 849-850.

Similarly, the proposition that the right to have an Article III judge preside over *voir dire* involves "the procedures by which civil and criminal matters must be tried," *Schor*, 478 U.S. at 848-849, does not establish that the right can be waived only through the defendant's explicit and personal consent. A defendant must personally waive the right to plead not guilty, the right to a jury, and the right to counsel, not because those decisions affect the framework of the trial as such, but because they so profoundly affect *the defendant* himself that the Constitution demands that the right cannot be lost without his knowing and intelligent relinquishment. Only that profound personal effect—and not a structural error *vel non*—justifies an insistence on an express indication of waiver directly from the accused and deviation

from the normal rule that an attorney speaks for the client.

For instance, a violation of a right to a public trial is a "structural defect affecting the framework within which the trial proceeds" and is thus not subject to harmless-error analysis. *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984). The right to a public trial, however, may be waived by the defendant short of his explicit and personal consent; failure to raise an objection alone is sufficient. *Peretz*, 501 U.S. at 936 (citing *Levine* v. *United States*, 362 U.S. 610, 619 (1960)); cf. note 3, *supra* (noting that lack of objection waives a defendant's right to be present during all stages of the trial and his right not to wear prison clothes at trial).

For similar reasons, petitioner mistakenly relies (Br. 30) on this Court's holding in *Gomez*, 490 U.S. at 876, that "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside" is a "basic" right that when infringed is not reviewed for harmlessness. As discussed, whether a right, if infringed, can be reviewed for prejudice does not necessarily dictate the circumstances under which the right may be waived. In any event, *Peretz* makes clear that the "holding in *Gomez* was narrow" and limited to the situation where the magistrate "'exceeds his jurisdiction' by selecting a jury '*despite the defendant's objection.*'" 501 U.S. at 927 (emphasis added) (quoting *Gomez*, 490 U.S. at 876).[7] If the Constitution "gives no

---

[7] When the Court in *Gomez* stated that the magistrate judge "exceeds his jurisdiction" in presiding over jury selection over a defendant's objection, 490 U.S. at 876, the term "jurisdiction" was used "as a synonym for 'authority,' not in the technical sense involving subject matter jurisdiction." *Peretz*, 501 U.S. at 953 (Scalia, J., dissenting); see

assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury," *id.* at 937, no error, much less a structural error, occurs when defense counsel expressly consents to the presence of the magistrate judge.

3. The record need not show that the defendant agreed with his counsel's actions

Petitioner argues (Br. 41-44) in the alternative that even if an explicit and personal waiver by the defendant is not required to cloak a magistrate judge with the authority to conduct *voir dire*, the record must at least be clear that the defendant understood his rights and agreed with his counsel's decision. Yet that hybrid form of waiver has no legal precedent and little to commend it as a matter of policy. As discussed, absent those rare situations in which the defendant's waiver must be explicit and personal, defense counsel is presumed to speak on behalf of his client. There is accordingly no need for the court *sua sponte* to inquire whether counsel has discussed the matter with the defendant and obtained his consent on the issue. Cf. *Nixon*, 543 U.S. at 187-189 (counsel was not ineffective in conceding his cli-

---

United States v. *Wey*, 895 F.2d 429, 431 (7th Cir.), cert. denied, 497 U.S. 1029 (1990); *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) (noting that jurisdiction is a term of many meanings and has often been used loosely by the Court). The district court, which is the judicial body before which the indictment is pending and which alone enters judgment, indisputably has subject matter jurisdiction. See 18 U.S.C. 3231. That conclusion is compelled by the holding in *Peretz* that a magistrate judge has the authority to preside over *voir dire* with the parties' consent. Cf. *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived.").

ent's guilt during capital penalty phase even absent the defendant's explicit and personal consent).

For instance, the lower courts generally have held that trial courts do not have to duty to ask whether the defendant has agreed to waive his right to testify, even though such a decision implicates concerns extending beyond mere trial strategy. See, *e.g.*, *United States* v. *Ortiz*, 82 F.3d 1066, 1069-1070 & n.8 (D.C. Cir. 1996) (citing decisions of the First, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits holding that trial courts do not need *sua sponte* to conduct an on-the-record colloquy about the defendant's waiver of his right to testify). "Although the ultimate decision whether to testify rests with the defendant," when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed. *United States* v. *Joelson*, 7 F.3d 174, 177 (9th Cir.), cert. denied, 510 U.S. 1019 (1993); *United States* v. *Pennycooke*, 65 F.3d 9, 12 (3d Cir. 1995) ("In the right to testify cases * * * the defendant is represented by counsel throughout the trial, and the court is entitled to—indeed should—presume that the attorney and the client have discussed that right.").

"Barring any statements or actions from the defendant indicating disagreement with counsel or the desire to testify, the trial court is neither required to sua sponte address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor ensure that the defendant has waived the right on the record." *United States* v. *Webber*, 208 F.3d 545, 551 (6th Cir. 2000); accord *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (Breyer, J.). Similarly, counsel's consent in this case to the magistrate judge's role in jury selection was properly imputed to petitioner

without a further inquiry into whether petitioner agreed with counsel.

Petitioner also argues that requiring the record to reflect an informed waiver by the defendant would not disrupt the trial process because the decision whether to consent to a magistrate judge's role during *voir dire* would be made at a finite point only once in the proceeding. Br. 31, 39-41; NACDL Amicus Br. 5-6, 15-16. The same could be said, however, of the one-time waiver of the right to testify, or defense counsel's one-time waiver of an opportunity to question prospective jurors, but in those contexts the defendant's assent to counsel's actions is presumed. See pp. 23-24, 28, *supra*.

Moreover, the law presumes that defense counsel has his client's assent not merely to avoid disrupting the trial but also to avoid disrupting the attorney-client relationship. The very nature of that relationship in the criminal system justice system depends on the lawyer being able to act as the defendant's agent with full authority to make tactical decisions concerning the trial. A court's *sua sponte* inquiry into whether the client agrees with such decisions undermines that relationship, and does so without any overriding benefit to a defendant who lacks legal training and skill. *Boyd*, 86 F.3d at 723. For similar reasons, it is irrelevant that a requirement of explicit and personal consent would have the salutary effect of minimizing later inquiries into whether counsel provided ineffective assistance. Pet. Br. 41. The same could be said of *all* strategic decisions made by counsel during the trial, yet counsel's word is binding absent a showing that counsel's actions fell below constitutional norms.

4. There is no basis for importing into 28 U.S.C. 636(b)(3) the consent procedures under 18 U.S.C. 3401(b) for a magistrate judge to preside over a misdemeanor trial

Petitioner argues that, had Congress confronted the issue, it would have directed courts to follow the procedures that Congress specified for a defendant to consent to a magistrate judge's presiding over an entire federal misdemeanor trial. Pet. 32-39; see NACDL Amicus Br. 16-27, 30. Those procedures require the court to notify the defendant "that he has a right to trial, judgment, and sentencing by a district judge" and prevent the magistrate from trying the case unless the defendant, in writing or orally on the record, "expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge." 18 U.S.C. 3401(b). That speculation is interesting, though debatable, but in all events provides no basis for applying the Section 3401(b) procedures in this quite different context.

Petitioner urges this Court to adopt those procedures in order to "avoid the serious constitutional question" of permitting defense counsel to consent to the magistrate judge's role in jury selection. Br. 33. As discussed, however, there is no serious constitutional question in this case because the magistrate judge did not conduct jury selection over petitioner's objection. See pp. 14-17, *supra*. And there is no other plausible basis for importing the Section 3401(b) requirements. Application of the consent requirements set forth in 18 U.S.C. 3401(b) was also specifically urged by the dissent in *Peretz*, 501 U.S. at 947 n.6 (Marshall, J., dissenting), but the Court did not see fit to impose those requirements, and Congress has not followed up on the sugges-

tion in the ensuing decade and a half. In any event, because Congress "did not focus on jury selection as a possible additional duty for magistrates," *id.* at 932, there is no basis for concluding that Congress would have expected courts to follow the procedures specified in 18 U.S.C. 3401(b), as opposed to the general rule that a defendant speaks through his counsel. Indeed, Congress's failure to act in the wake of *Peretz* suggests Congress chose to follow the latter course.

Congress could well have concluded that the defendant's explicit and personal consent was appropriate if a magistrate judge were to conduct the misdemeanor trial itself and to determine the defendant's fate at sentencing, while believing, if it had considered the question, that such a high level of personal consent was unnecessary if the magistrate judge were simply to preside over one stage of a felony trial—jury selection—after which an Article III judge would take over and conduct the actual trial and impose any sentence and judgment of conviction. Congress would have every reason to draw that distinction in light of counsel's established role in speaking for the defendant on all other matters during jury selection and in light of the numerous tactical and strategic reasons counsel might have preferred that the magistrate judge preside over *voir dire*. See pp. 18-24, *supra*.

Congress also spoke to the issue of consent in the Federal Magistrates Act in Section 636(c)(1), which authorizes a district court, "[u]pon the consent of the parties," to refer to a magistrate judge case-dispositive civil litigation. 28 U.S.C. 636(c)(1); see *Peretz*, 501 U.S. at 933 (observing that a magistrate judge's supervision of entire civil and misdemeanor trials is "comparable in responsibility and importance to presiding over *voir dire*

at a felony trial"). In *Roell* v. *Withrow*, 538 U.S. 580, 584 (2003), the Court rejected the notion that "consent cannot be implied by the conduct of the parties." The Court held that "the better rule is to accept implied consent where, as here, the litigant *or counsel* was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Id* at 590 (emphasis added). The Court reasoned that "[i]nferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Ibid.*

That analysis applies with even greater force in this case. Counsel in this case did more than just implicitly consent to the magistrate judge's role in conducting *voir dire*. The magistrate judge specifically asked the parties whether they consented to having her preside over *voir dire*, and petitioner's counsel expressly consented to that procedure. No complaints were heard from petitioner until he was convicted and the case was on appeal. Under these circumstances, the court and the prosecutor were entitled to assume that petitioner had abandoned any objection to allowing the magistrate to conduct *voir dire*.

II. THE COURT OF APPEALS CORRECTLY REVIEWED PETITIONER'S OBJECTION FOR PLAIN ERROR

Even assuming that the trial court below erred in its referral of jury selection to the magistrate absent petitioner's explicit and personal consent, petitioner forfeited that claim of error by failing to object before either the district judge or the magistrate judge. "'No procedural principle is more familiar to this Court than

that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); accord *United States* v. *Cotton*, 535 U.S. 625, 631 (2002); *Peretz*, 501 U.S. at 936-937; *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). That principle is embodied in Federal Rule of Criminal Procedure 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Petitioner is subject to Rule 52(b) in this case, and petitioner cannot make the necessary showing that it was plain error to permit the magistrate judge to conduct jury selection with defense counsel's express consent.

A. Rule 52(b) Applies To Petitioner's Improper Delegation Claim

1. Petitioner argues that Rule 52(b) does not apply in this case because Federal Rule of Criminal Procedure 51(b) provides that "[i]f a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Br. 46. Petitioner claims that Rule 51(b) applies in this case because he was not present at the bench when counsel consented on his behalf, and because the record does not otherwise reflect the defendant's informed consent. Br. 47. He further contends that his *counsel's* opportunity to object is "beside the point" because the nature of the claimed error is that counsel's waiver was ineffective. *Ibid.* Those contentions lack merit.

Petitioner was represented by counsel who, as his agent, spoke for petitioner. The only inquiry is thus whether there was an opportunity for an objection *by the defense*. Here, the magistrate judge explicitly asked the prosecutor and defense counsel if she could assist with jury selection, J.A. 16, thereby plainly giving the parties the "opportunity to object." Fed. R. Crim. P. 51(b). Had counsel for either petitioner or the government *objected* to the magistrate judge's role in supervising jury selection, it would be clear that counsel spoke on behalf of the "party" that counsel represented. *Ibid.* Indeed, in *Gomez* itself, the objection to assigning jury selection to the magistrate judge was made by defense counsel. 490 U.S. at 860-861. There was likewise nothing to stop petitioner's counsel from insisting that the magistrate obtain the defendant's explicit and personal consent. Such a course of action would have cured any claim of error and would have prevented the risk of gamesmanship. *Roell*, 538 U.S. at 590; *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985) (per curiam); *Sykes*, 433 U.S. at 89-90; *Williams*, 425 U.S. at 508 n.3.[8]

2. Petitioner also argues (Br. 49-51) that Rule 52(b) has no application to a claim that a constitutional right

---

[8] While represented defendants are not ordinarily expected to address the court, petitioner himself was not deprived of an opportunity to object to magistrate judge's role, assuming he had concerns with that role that were apparently not shared by his counsel. Following counsel's request for the assistance of an interpreter, the magistrate introduced herself on the record. J.A. 16-17; note 1, *supra*. The rule petitioner advocates, moreover, would relieve a defendant of the obligation to object to the magistrate judge's role in jury selection (or to the judge's failure to secure his personal and explicit consent) even where the defendant had discussed the matter with his counsel and specifically directed his counsel to consent to have the magistrate judge preside over *voir dire*.

was violated without an adequate waiver by the defendant. Even assuming that petitioner's *constitutional* rights were violated (but see *Peretz*, 501 U.S. at 936, 937), petitioner's claim of error is nonetheless subject to review only for plain error.

Rule 52(b) applies to *all* claims of error, including a claim of error based on an invalid waiver of a constitutional or statutory right. In *Johnson* v. *United States*, 520 U.S. 461, 466 (1997), this Court rejected the argument that the plain-error rule was inapplicable because the error was asserted was "structural." The Court explained that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Ibid.* Rule 52(b), the Court added, "governs direct appeals from judgments of conviction in the federal system," and reflects a balance of the need to redress injustice against the need to encourage timely objections in the first instance. *Ibid.* "Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make." *Ibid.*; see *Peguero* v. *United States*, 526 U.S. 23, 29 (1999) ("Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.") (quoting *Bank of N.S.* v. *United States*, 487 U.S. 250, 255 (1988)).

This Court accordingly has held that Rule 52(b) applies even when the nature of the claimed error is that the defendant did not make an informed waiver of his rights. In *United States* v. *Vonn*, 535 U.S. 55 (2002), the Court reviewed for plain error under Rule 52(b) the

claim that a defendant did not adequately waive his rights in pleading guilty because the trial court failed to advise him of his right to counsel at trial as required by Federal Rule of Criminal Procedure 11. The Court rejected the dissenting view of Justice Stevens that it was "perverse" to require "an uninformed defendant to object to deviation from Rule 11 or to establish prejudice arising out of the judge's failure to mention a right that he does not know he has." 535 U.S. at 78-79 (Stevens, J., concurring in part and dissenting in part). The Court responded (*id.* at 73 n.10) that "counsel is obligated to understand the Rule 11 requirements" and that "[i]t is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court." *Ibid.* The Court concluded that "[i]t therefore makes sense to require counsel to call a Rule 11 failing to the court's attention." *Ibid.*[9]

---

[9] Petitioner argues (Br. 50 n. 37) that the Court in *United States* v. *Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004), implied that plain-error review would not apply to a *constitutional* claim that a defendant did not validly waive his rights in pleading guilty. That is not correct. In *Dominguez Benitez*, the Court described the effect on "substantial rights" under Rule 52(b) that a defendant must establish from a Rule 11 error in order to show plain error; *i.e.* "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83. The court then drew a contrast to a claim that the record contained no evidence that a defendant knew of the constitutional rights he was waiving by pleading guilty, stating that it did not suggest that such a "conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.* at 84 n.10. That footnote addressed the showing needed to establish an effect on substantial rights under Rule 52(b) for different types of violations; it did not create an exception to Rule 52(b). Any reading of that footnote for the broader proposition that a claim of an invalid waiver cannot be forfeited would run directly counter to

That analysis applies even with more force here. As discussed, counsel and the petitioner did not merely stay silent as the magistrate judge conducted *voir dire*; petitioner's counsel affirmatively agreed to the magistrate judge's role. J.A. 16. The fair and orderly administration of criminal proceedings required counsel to call any claim of error to the trial court's attention, and petitioner should not now be rewarded with a new trial because the magistrate judge did precisely what was agreed to by counsel.

3. Petitioner further argues that Rule 52(b) does not apply in this case because an objection would have cured any error and thus the only way the error could be reviewed is by raising it for the first time on appeal. Br. 51-54. Petitioner relies on Justice Scalia's dissenting opinion in *Peretz*, 501 U.S. at 953-955, where he concluded:

> By definition, these claims can be advanced *only* by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would *never* know whether the Act authorizes them, with the defendant's consent, to refer felony *voir dire* to a magistrate, and, if so, what form the consent must take.

Id. at 954-555. Justice Scalia's dissenting opinion makes clear, however, that a defendant who fails to raise at trial his objection to having a magistrate judge preside over *voir dire* "plainly forfeit[s] his *right* to advance his

---

this Court's explicit refusal to create exceptions to Rule 52(b) in *Johnson*.

current challenges to the Magistrate's role." *Id.* at 953. In any event, the very purpose of the contemporaneous objection rule is to require litigants to bring the error to the court's attention in the first place so that the error can be cured and the issue removed as a basis for appeal. Thus, Rule 52(b) applies, for instance, when a defendant fails to object to presence of alternate jurors during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c), *Olano*, *supra*, or when he fails to object to an error under Rule 11, *Vonn*, *supra*, even though had the defendant objected the court presumably would have cured the error on the spot.

More recent decisions of this Court have also refined the standard for plain-error review, as well as addressed the concerns expressed in Justice Scalia's analysis. A reviewing court may not correct an error under Rule 52(b) until *after* the court is satisfied that all of the requirements of the Rule have been shown. *Johnson*, 520 U.S. at 466-467; *Olano*, 507 U.S. at 732. Courts also need not simply reach a blanket conclusion of plain error in a way that would preclude the development of the law. There is no rigid "order-of-battle rule" that dictates the order in which the four factors should be addressed. Cf. *Morse* v. *Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J. concurring in the judgment in part and dissenting in part). Courts may flesh out the law in addressing the first component of plain-error review, which asks whether there was error, *i.e.*, whether there was "[d]eviation from a legal rule" and whether "the rule has been waived." *Olano*, 507 U.S. at 732-733. Thus, the court of appeals in this case applied Rule 52(b) and reached petitioner's underlying claim of error, concluding that "there is no error here; the right to have an

Article III judge conduct voir dire is one that may be waived through the consent of counsel." J.A. 33.

4. Petitioner argues that applying Rule 52(b) would serve no legitimate governmental interest and would anomalously impose a stricter error-preservation rule on federal defendants than that imposed on similarly situated state defendants. Br. 54-58. But Rule 52(b) obviously serves the government's legitimate interest in not upsetting a criminal conviction, with all the attendant societal costs (see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986)), when an objection could have cured the error or, as here, when the court followed a procedure agreed to by defense counsel. In any event, this Court in *Johnson* has already rejected the suggestion that this Court's review of appeals from state court judgments, either by direct or collateral review, should dictate the application of Rule 52(b). The Court concluded "it is [Rule 52(b)] which by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." 520 U.S. at 466.

B. Any Error In Having The Magistrate Judge Preside Over *Voir Dire* Does Not Satisfy The Requirements For Plain Error Under Rule 52(b)

Under Rule 52(b), a court of appeals is required to reject a forfeited claim unless the defendant makes four distinct showings. As this Court has explained:

> [B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "'seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings.'"

Johnson, 520 U.S. at 466-467 (quoting *Olano*, 507 U.S. at 732). Petitioner's claim does not satisfy those requirements because, even if the magistrate judge erred in presiding over *voir dire* with defense counsel's consent, petitioner has not shown that such error was plain, affected petitioner's substantial rights, or seriously affected the fairness, integrity or public reputation of judicial proceedings.

1. Any error in allowing the magistrate judge to supervise* voir dire *was not "plain" within the meaning of Rule 52(b)

For the reasons previously given, the United States does not believe that there is either constitutional or statutory error when a magistrate judge conducts *voir dire* with defense counsel's consent, even if the defendant does not explicitly and personally consent to the magistrate judge's role. But if the Court concludes to the contrary, such an error was not "plain" under Rule 52(b). For an error to be "plain," it must be clear and "settled * * * at the time of appellate consideration." *Johnson*, 520 U.S. at 468; *Olano*, 507 U.S. at 734 ("'Plain' is synonymous with 'clear,' or, equivalently, 'obvious.'") (quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)).[10]

---

[10] Petitioner does not argue that an error can *become* "plain" when this Court for the first time reaches the merits of a defaulted claim and finds error. Nor would such an argument be valid, as there would be no meaningful independent requirement that the error be "plain" if the defendant need only in this Court establish an error involving an unsettled issue.

Petitioner argues that the error was plain in light of *Gomez* and *Peretz* and other precedents indicating that a litigant must personally waive basic personal rights. Br. 58-59. No such personal consent, however, was required in *Peretz*. That decision also specifically rejected the notion that a defendant who sits silently as the magistrate judge conducts *voir dire* has any statutory or constitutional rights, and *Peretz* likewise repeatedly endorsed the view of the lower courts that had limited *Gomez* to the situation where the defendant actually voices an objection to the magistrate judge's role. See pp. 14-17, *supra*. Furthermore, under this Court's precedents, courts are entitled to presume that counsel speaks on the defendant's behalf when making strategic or tactical decisions during the course of a criminal proceeding. See pp. 19-21, *supra*,

Far from any error being obvious, the overwhelming consensus of authority at the time of petitioner's trial as well as at the time of his appeal was that delegation of *voir dire* to a magistrate judge did not depend on obtaining a defendant's personal, informed consent—a fact that may explain why defense counsel here consented to the magistrate judge's role on behalf of his client. Based on *Peretz*, four courts of appeals had concluded that a defendant need not give any form of affirmative consent to the supervision of *voir dire* by a magistrate judge. See *United States* v. *Desir*, 273 F.3d 39, 44 (1st Cir. 2001) (holding that "affirmative consent is not required" and that "a magistrate may conduct jury selection unless the defendant or his attorney registers an objection"); *Clark* v. *Poulton*, 963 F.2d 1361, 1366 n.5 (10th Cir.) ("*Peretz* permits referral to the magistrate of felony trial jury voir dire where the parties consent *or* where the defendant raises no objection."), cert. denied,

506 U.S. 1014 (1992); *United States* v. *Arnoldt*, 947 F.2d 1120, 1123 (4th Cir. 1991) (under *Peretz*, the failure to object to the delegation of authority to the magistrate waives any resulting constitutional error), cert. denied, 503 U.S. 983 (1992); *United States* v. *Jones*, 938 F.2d 737, 744 (7th Cir. 1991) (holding referral of jury selection to magistrate judge was not plain error and that "our outcome is the same" whether the defendant "simply did not object or in fact consented to this procedure").

Two other courts of appeals had required affirmative consent to a delegation of *voir dire* to a magistrate judge, but also had indicated that a statement by counsel is sufficient. The Eighth Circuit, in a civil case, *Harris* v. *Folk Constr. Co.*, 138 F.3d 365 (1998), reiterated its "consistent[]" holding that "[s]ection 636(c) requires a clear and unambiguous statement in the record of the affected parties' consent." *Id.* at 369 (quoting *Reiter* v. *Honeywell, Inc.*, 104 F.3d 1071, 1073 (8th Cir. 1997)). It acknowledged, however, that the statements of counsel such as those at issue in *Peretz* can serve as a sufficiently "clear and unambiguous statement." *Ibid.* (distinguishing *Peretz* on the ground that in "the instant [case] * * * there was no discernible statement of consent by the litigants"); see *Reiter*, 104 F.3d at 1073 ("In *Peretz v. United States*, the parties expressly consented to the magistrate judge's conducting of the voir dire."). Similarly, the Ninth Circuit had merely held, in other contexts, that "'consent by failure to object' is insufficient to clothe the magistrate with § 636(c) powers," *United States* v. *Gomez-Lepe*, 207 F.3d 623, 631 (2000) (quoting *Nasca* v. *Peoplesoft*, 160 F.3d 578, 579 (9th Cir. 1998)); it had not held, however, that consent by counsel was insufficient absent the defendant's explicit and per-

sonal consent. Since then, albeit shortly after the court of appeals' decision, the Ninth Circuit held that a magistrate judge has the authority to preside over closing argument with consent of counsel alone. *Gamba*, 483 F.3d at 948.

Only the Eleventh Circuit had held that the magistrate judge could not conduct *voir dire* without the defendant's explicit and personal consent on the record. *United States* v. *Maragh*, 189 F.3d 1315, 1318 (1999) (per curiam). Given the near consensus of opinion in the lower courts that counsel's consent was sufficient, the delegation to the magistrate judge in this case to conduct *voir dire* did not constitute an error that was "plain" for purposes of Rule 52(b).

2. Any error in the failure to obtain petitioner's explicit and personal consent did not affect petitioner's substantial rights

a. An effect on substantial rights under the plain-error rule has the same meaning that it has under the harmless-error rule (Fed. R. Crim. P. 52(a)), although the defendant has the burden of showing an effect on substantial rights under the plain-error rule, whereas the government has the burden of proof under the harmless-error rule. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81-82 (2004); *Vonn*, 535 U.S. at 62-63; *Olano*, 507 U.S. at 734. This Court's precedents establish that the proper test for harmless error under Rule 52(a) is generally whether the error affected the "outcome" or "result" of the particular proceeding at issue. See, *e.g.*, *Dominguez Benitez*, 542 U.S. at 82-83; *Olano*, 507 U.S. at 734. This Court in *Gomez* held that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without

any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 490 U.S. at 876.

To the extent that the Court equates error under *Gomez* with any error it finds in this case, petitioner would establish an effect on "substantial rights" without more. But the error in *Gomez* differs critically from the alleged error in this case. In *Gomez*, the defense objected to the magistrate judge's conduct of jury selection. In this case, defense counsel welcomed the magistrate judge's role, and petitioner's personal views about the magistrate judge's conduct of jury selection are, on this record, unknown. It would be inappropriate to presume that a defendant in that situation would object to a magistrate judge's participation if the court asked him for his views. To the contrary, the most likely scenario is that a defendant would defer to his counsel's strategic and tactical decision to have the magistrate judge conduct jury selection and would give explicit consent if asked. That is because counsel most likely consents to the magistrate judge's role only because of a belief that such consent would advance the defendant's interests in securing a jury favorable to the defense, and because the decision about the presiding officer falls clearly within a lawyer's domain. Accordingly, it is likely that the alleged error in this case did not change the identity of the judicial officer who presided over jury selection.

Because of the distinction between *Gomez* error (where counsel affirmatively preferred a different judicial officer to conduct jury selection, and his client presumably agreed) and the alleged error here (where counsel affirmatively preferred the magistrate judge and nothing suggests that his client would have disagreed), it would be appropriate to make an effect on

substantial rights turn on whether the defendant can establish a sufficient likelihood that he would not have given personal and explicit consent to the magistrate judge's participation. That standard would be analogous to the showing on plain-error review that a defendant must make to void his guilty plea based on Rule 11 error. Such a defendant must "show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83; see *id.* at 83 n.9 (noting that a "reasonable[] probability" does not require a showing "by a preponderance of the evidence that but for error things would have been different").

It is certainly true that, on plain-error review, a defendant would rarely, if ever, be able to meet that test, because the defendant could not enlarge the record to establish facts from which it could be inferred that the defendant may not have given his consent, and the record is not likely to contain evidence suggesting that the defendant would have disputed his lawyer's choice. But a defendant should be able to succeed on plain-error review of a claim like petitioner's only in exceptional circumstances, given the presumption that counsel acts in his client's interest and the unlikelihood that a criminal defendant would harbor a preference for a judicial officer to preside over jury selection that contradicted his counsel's advice. Cf. *Dominguez Benitez*, 542 U.S. at 83 n.9 (acknowledging that, on plain-error review, relief in the form of setting aside a guilty plea for Rule 11 error "will be difficult to get, *as it should be*") (emphasis added).[11]

---

[11] As noted, a defendant could raise a claim of ineffective assistance of counsel on collateral review under 28 U.S.C. 2255, in which case he would need to show both deficient performance in counsel's failure to require the court to secure the defendant's personal and explicit con-

In this case, petitioner has not argued that there is any reasonable probability that he would have withheld personal and explicit consent to the magistrate judge's role, if the court had asked him. Nor is there anything in the record that suggests that petitioner would have made such a choice. Although courts do not presume a knowing waiver of constitutional rights in a guilty plea from a "silent record," *Boykin*, 395 U.S. at 242 (quoting *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962)), the issue at this stage of plain-error analysis is not whether petitioner waived his assumed right to give personal consent to the magistrate judge's role. Rather, it is whether he can establish that the court's failure to inquire of him had an effect on his substantial rights. Petitioner has not attempted to make that showing.

b. The alleged error in this case cannot be equated with errors such as the constitutionally invalid waiver of a jury trial or the entry of an unknowing and unintelligent guilty plea. Such defects affect substantial rights

---

sent and prejudice. *Strickland*, *supra*. In that setting, a defendant could develop the record to establish prejudice, *i.e.*, that there is a reasonable probability that he would have withheld consent. That approach would be consistent with other claimed ineffectiveness violations involving deprivation of a defendant's choice on how to exercise his rights. See *Hill* v. *Lockhart*, 474 US. 52, 59 (1985) (where a defendant alleges ineffectiveness based on counsel's errors in connection with a guilty plea, to show prejudice a defendant must establish a reasonable probability that, but for counsel's error, the defendant "would not have pleaded guilty and would have insisted on going to trial"); *Flores-Ortega*, 528 U.S. at 484 (where a defendant alleges ineffectiveness based on counsel's errors in consulting with a defendant concerning whether to appeal, "to show prejudice * * * a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed").

even if, for example, the record overwhelmingly makes clear that the defendant would have pleaded guilty if he had been fully aware of his rights. *Dominguez Benitez*, 542 U.S. at 84 n.10; see *Miller* v. *Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (attorney's waiver of jury trial on behalf of his client is structural Sixth Amendment error). This case presents a different issue. In light of *Peretz*, no constitutional error can be found when a magistrate judge presides over jury selection unless the defense has made an "objection." 501 U.S. at 936; pp. 14-17, *supra*. And a *statutory* right to give personal and explicit consent to a magistrate judge's presiding at jury selection would not be equivalent to the constitutional right to a trial (or jury trial) absent a knowing and intelligent waiver.

Even if the Court found constitutional error here, in at least two significant respects, the error would differ from the accused's right to have a trial and right to a jury. First, those rights pervasively affect the outcome of a criminal case, either by changing the decision maker or by eliminating the contest over guilt. The right to have an Article III judge preside over *voir dire* has a far more modest function. Second, a defendant is likely to have an independent opinion, which may differ from his counsel, on whether to have a judge rather than a jury decide his guilt, or to concede guilt altogether. In contrast, he is much less likely to differ with counsel on the more technical (and less consequential) question of which judicial officer should preside at jury selection. Accordingly, the proper test for establishing an effect on substantial rights in this context should focus, as in *Dominguez Benitez*, on the likelihood that a defendant would have proceeded differently if the error had not been committed.

c. Ultimately, however, this Court need not decide whether a defendant in petitioner's position must show that he would not have consented to the magistrate judge's role in order to establish an effect on substantial rights. Even if an effect on substantial rights is established merely from the error itself, petitioner could not meet the fourth requirement for plain-error relief, as discussed below. See *Cotton*, 535 U.S. at 632-633 (declining to resolve whether omission from the indictment of a fact that increases a statutory maximum sentence affected substantial rights because "even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings"); *Johnson*, 520 U.S. at 469 (declining to resolve whether omission of an offense element from a jury instruction affected substantial rights because the error did not meet the fourth requirement of plain-error review).

3. Any error in having the magistrate judge conduct voir dire *did not seriously affect the fairness, integrity, or public reputation of judicial proceedings*

Finally, reversal of petitioner's conviction is clearly unwarranted under the fourth component of the plain-error rule. Petitioner has made no claim that the result of his trial would have been different if the magistrate judge had not presided over *voir dire*. He likewise makes no claim that he would have voiced an objection, contrary to his counsel's wishes, to the magistrate judge's role had the court *sua sponte* sought his explicit and personal consent.

As the record makes clear, moreover, jury selection in this case proceeded without incident or controversy. Both parties were allowed to make statements to the

venire members and to frame and ask their own series of questions. The prospective jurors that were excused for cause were excused either at defense counsel's request or without objection by defense counsel. Defense counsel raised neither objections to any rulings by the magistrate judge during *voir dire* nor expressed dissatisfaction at any time with the jury that was ultimately chosen. And the only error alleged is that the magistrate judge conducted *voir dire* with consent of defense counsel rather than the petitioner personally—a procedure that the majority of court of appeals had held was in compliance with this Court's decision in *Peretz*. Those circumstances hardly rise to a "miscarriage of justice" that would dictate relief notwithstanding petitioner's procedural default of his claim. *Olano*, 507 U.S. at 736 (quoting *Young*, 470 U.S. at 15).[12]

Quite to the contrary, to grant relief in this case would seriously detract from "the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. Petitioner's claim for relief strikes at the core of the contemporaneous-objection rule. That rule not only promotes judicial economy by allowing the court to correct any claimed error. *Luce* v. *United States*, 469 U.S. 38, 41-42 (1984); *Sykes*, 433 U.S. at 90. It also guards against the "risk of gamesmanship by

[12] The National Association of Criminal Defense Lawyers and the National Association of Federal Defenders argue, without citation to the record, that defense counsel was coerced to consenting to have the magistrate judge preside over *voir dire* because an objection "would have significantly delayed the proceedings and inconvenienced the district judge, the magistrate judge, and the prospective jurors." NACDL Amicus Br. 32. There is no basis for concluding that the trial court was not fully prepared to conduct *voir dire* had counsel objected. Nor has petitioner made any claim that his counsel felt coerced in consenting to the magistrate judge's role.

depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Roell*, 538 U.S. at 590; accord *Vonn*, 535 U.S. at 73 n.10; *Williams*, 425 U.S. at 508.

As discussed, petitioner utterly failed to give the trial court the opportunity to resolve any objection to the magistrate judge, who presided over jury selection only after the judge obtained the express consent of petitioner's counsel. Allowing defense counsel to agree to a particular procedure and then seek reversal because the court carried out that agreement is inconsistent with basic rules of fairness and "sound considerations of judicial economy." *Thomas* v. *Arn*, 474 U.S. 140, 147 (1985). To recognize such claims would provide an incentive to inject error into the proceedings in the hope of creating an issue that could be raised on appeal in the event of a conviction. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). And such a rule would give defendants the benefit of both worlds: the procedure the defense prefers at the trial level, and a potentially winning argument on appeal if the case turns out badly.

Petitioner asserts that the "record disposes of any suggestion" that counsel "intentionally" created an error to raise on appeal because counsel did not invite the error and it is only rarely the case that counsel would consent outside the presence of his client. Br. 48 n.36. Petitioner offers no empirical proof to support the latter assertion and both assertions miss the point in any event. A party may not engage in "sandbagging" by "suggesting *or permitting*, for strategic reasons, that the trial court pursue a certain course, and later * * * claiming that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the

judgment) (emphasis added). The rule petitioner advocates also would apply even where counsel knows the court is committing error by not securing the defendant's explicit and personal consent. And petitioner's rule would apply in other cases even where the defendant affirmatively preferred that the magistrate judge preside over *voir dire* but the defendant did not express on the record his explicit and personal consent. That is not a rule that would promote fairness, integrity, or public confidence in criminal proceedings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

DECEMBER 2007

73

791

(3)

FILED
NOV 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

44pg No. 06-11612

In the Supreme Court of the United States

HOMERO GONZALEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, N.W.,
Washington, D.C. 20036
(212) 732-0707

JOEL B. RUDIN
Counsel of Record
200 West 57th Street
New York, NY 10019
(212) 752-7600

HENRY J. BEMPORAD
NAT'L ASS'N OF FEDERAL DEFENDERS
Co-Chair, Amicus Committee
727 East Durango Blvd., Suite B-207
San Antonio, Texas 78216
(210) 472-6700
Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 4

ARGUMENT

THE FEDERAL MAGISTRATES ACT REQUIRES THAT A CRIMINAL DEFENDANT PERSONALLY GIVE KNOWING, VOLUNTARY CONSENT TO THE DELEGATION OF FELONY TRIAL *VOIR DIRE* TO A MAGISTRATE JUDGE 8

A. A Construction of the Federal Magistrates Act That Permitted a Defendant's Fundamental, Personal Right to the Presence of an Article III District Judge to Be Waived by the Defendant's Counsel Would Raise a Significant Constitutional Issue of the Type That It Is This Court's 'Settled Policy' To Avoid 8

B. Congress Believed That Article III Required A Criminal Defendant's Personal Consent, Given Knowingly and Voluntarily, Before Critical Criminal Trial Functions Could Be Lawfully Delegated to a Magistrate .. 16

TABLE OF CONTENTS
(continued)

Page

1. The Congress That Enacted the Original Magistrates Act in 1968 Believed That a Criminal Defendant Had a Constitutional Right to the Presence of an Article III Officer at Trial and That Waiver of This Right Had to Be Explicit, Personal, Non-Coerced, And With Knowledge of the Right Being Waived 18

2. In Amending the Act in 1976 to Clarify Magistrates' 'Additional Duties,' Congress Did Not Relax The Stringent, Written Consent Requirement for Magistrates to Exercise Criminal Trial Jurisdiction 21

3. In Expanding Magistrates' Criminal and Civil Trial Jurisdiction in 1979, Congress Reiterated Its Requirement That Consent Be Personal, Knowing, And Truly Voluntary 22

TABLE OF CONTENTS
(continued)

Page

C. Having Limited Magistrates' Criminal Trial Jurisdiction to Misdemeanors, And Insisted That Such Jurisdiction Be Exercised Only When the Defendant Gives Personal, Knowing, Voluntary Consent, Congress Could Not Possibly Have Intended District Courts, Pursuant To the 'Additional Duties' Clause, to 'Experiment' With Delegating *Voir Dire* In *Felony* Trials Without Obtaining Comparable Consent 25

D. A Formal Consent Procedure During Which a Criminal Defendant Is Informed Of His Right to an Article III Judge, That He May Refuse to Consent to the Delegation of the *Voir Dire* Process to a Magistrate Judge, and That Such Failure To Consent Will Not Be Held Against Him, Is Essential to Effectuate Congressional Intent and to Avoid the Inherent Coercion That Occurred in This Case 31

CONCLUSION 34

TABLE OF AUTHORITIES

Page

Cases

Aetna Ins. Co. v. Kennedy ex rel Bogash, 301 U.S. 389 (1937) 15

Barker v. Wingo, 407 U.S. 514 (1972) 15

Boykin v. Alabama, 395 U.S. 238 (1969) 14

Brookhart v. Janis, 384 U.S. 1 (1966) 14

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) .. 5, 8, 11, 14, 15

Duncan v. Louisiana, 391 U.S. 145 (1968) 14

Gomez v. United States, 490 U.S. 858 (1989) ..... *passim*

Hopt v. Utah, 110 U.S. 5764 (1994) 26 n.5

Johnson v. Zerbst, 304 U.S. 458 (1938) 14, 24

Jones v. Barnes, 463 U.S. 745 (1983) 33 n.6

Lewis v. United States, 146 U.S. 370 (1892) ... 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 16

TABLE OF AUTHORITIES
(continued)

Page

New York v. Hill, 528 U.S. 110 (2000) 14, 15

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 11

Patton v. Yount, 467 U.S. 1025 (1984) 12

Peretz v. United States, 501 U.S. 923 (1991) ..... *passim*

Powers v. Ohio, 499 U.S. 400 (1991) 12

Roell v. Withrow, 538 U.S. 580 (2003) 15, 27-28, 28 n.7

Rosales-Lopez v. United States, 451 U.S. 182 (1981) 12

Swain v. Alabama, 380 U.S. 202 (1965) 12

United States v. Gamba, 483 F.3d 942 (9th Cir. 2007) 33

United States v. Hatter, 532 U.S. 557 (2001) .. 11

United States v. Olano, 507 U.S. 725 (1993) ... 14

TABLE OF AUTHORITIES
(continued)

Page

United States v. Perez,
387 F.3d 201 (2d Cir. 2004) 13 n.4

United States v. Powell, 469 U.S. 57 (1984) ... 12

Constitutional and Statutory Provisions

U.S. Const. Art. III ..... *passim*

U.S. Const. Amend. V ..... *passim*

United States Code, Title 18

Section 3006A 2

Section 3161 ..... 26 n.5

Section 3401(b) 18, 24, 27 n.6, 29

United States Code, Title 28

Section 636 ..... *passim*

Federal Courts Improvement Act of 1996, Pub.
L. No. 104-317, 110 Stat. 3847 (1996) ... 27 n.6

TABLE OF AUTHORITIES
(continued)

Page

Federal Rules of Criminal Procedure

Rule 11(b)(1) 33 n.8

Rule 43(a) 26 n.5

Legislative Materials

H.R. Rep. No. 90-1629 (1968), 1968 U.S. Code Cong & Admin. News 4252 18-19

Federal Magistrates Act: Hearings Before Subcomm. No. 4 Of the House Comm. On the Judiciary, 90th Cong. (1968) 19-20

114 Cong. Rec. 27338-42 (1968) 20-21

H.R. Rep. No. 94-1609 (1976), 1976 U.S. Code Cong. & Admin. News 6162 22

H.R. Rep. No. 96-287 (1979) 24

S. Rep. No. 96-74 (1979), 1979 U.S. Code Cong & Admin. News 1469 .... 24-25, 28

TABLE OF AUTHORITIES
(continued)

Page

Secondary Sources

Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L. J. 1179 (1975) 33 n.8

Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004) 33 n.8

Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 Am. Crim. L. Rev. 73 (1993) 33 n.8

Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 Pa. L. Rev. 473 (1978) 16

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-11612

HOMERO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Federal Defenders ("NAFD") as *amici curiae* in support of Petitioner, with the written consent of the parties.[1]

[1] As required by Rule 37.6 of this Court, *amici curiae* submit that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in safeguarding the procedural and substantive rights of criminal defendants.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership

includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

Amici Curiae file this brief because of their concern about the erosion of federal criminal defendants' constitutional right to the presence at felony trials of independent, Article III district judges, which we believe an affirmance in this case would encourage. Magistrate judges must not be permitted to pressure lawyers to surrender their clients' fundamental Article III right, as occurred in this case. We review the legislative history of the Federal Magistrates Act ("FMA") in considerable detail below because it shows that Congress unquestionably shared this view, and intended, as an essential predicate for a magistrate judge to exercise trial jurisdiction, that the defendant's explicit, voluntary, knowing, and personal waiver be obtained.

SUMMARY OF ARGUMENT

In *Gomez v. United States*, 490 U.S. 858 (1989), this Court held that the FMA does not authorize a magistrate to conduct *voir dire* in a felony trial over the defendant's objection. It reached this conclusion by applying the "settled policy" that a statute should be construed, if possible, to avoid a constitutional issue, and by analyzing Congressional intent in light of the overall statutory scheme. Congress, the Court held, carefully limited the trial jurisdiction of magistrates in criminal cases to petty offenses and misdemeanors, and then only where the defendant explicitly and voluntarily consented in writing.

In *Peretz v. United States*, 501 U.S. 923 (1991), a closely divided Court held there was no constitutional issue when a magistrate conducts *voir dire* with the defendant's consent, and that such a procedure was authorized by the Act's "additional duties" clause. The Court did not decide the issue, raised here, of whether "consent" must be communicated personally by the defendant and be knowing and voluntary.

We agree with Petitioner that his claim raises a substantial constitutional question. As in *Gomez*, a construction of the statute that avoids that constitutional question also happens to be consistent with the legislative history. Congress did not intend such a significant constitutional function to be

delegated absent the defendant's personal, knowing, voluntary consent.

It seems beyond serious doubt that, under Article III, a felony defendant, at all critical stages of his trial, is entitled to the presence of a district court judge, appointed by the President and confirmed by the Senate, who is immune from outside pressure by virtue of his life-time tenure and irreducible salary. Jury selection, as the *Gomez* Court recognized, is such a critical stage of trial. It is in many instances the most important part of the trial, as the composition of the jury may very well determine the trial's outcome. It is also a process that is relatively immune from effective review by a higher tribunal. Thus, a felony defendant has a fundamental right to the personal presence of an Article III judge at *voir dire*.

Although due process does not require the waiver of all of a defendant's procedural trial rights to be effected personally, as opposed to by the actions or inactions of the defendant's attorney, the right at issue here is much closer in nature to those rights that must be waived personally by the defendant than to those rights that need not be. Article III rights, as this Court recognized in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986), involve the trial's basic structure or mode of procedure, and are easily susceptible to formal waiver by the defendant at a particular time prior to

trial, as opposed to the kinds of evidentiary and strategic issues that may arise suddenly at trial and force counsel to make on-the-spot choices. At the very least, the question of whether a defendant's waiver of his right to an Article III judge at *voir dire* must be made by the defendant personally raises a significant constitutional issue that the statute should be construed to avoid.

The FMA's history makes clear that, regardless of how the Court at present would construe constitutional requirements, *Congress* believed that the delegation of trial functions to magistrates posed substantial Article III and due process issues that *Congress* intended to avoid by requiring explicit constitutional warnings and, at least in criminal cases, the defendant's personal, voluntary consent.

This Congressional intent is clear, as we show below, in the legislative history of the 1968 act, which established the position of magistrate and authorized magistrates, with explicit consent, to conduct petty offense and certain misdemeanor trials. Congressional intent is also clear in the history of the 1976 amendments intended to clarify magistrates' additional duties, and of the 1979 amendments slightly expanding magistrates' misdemeanor trial jurisdiction, and creating civil trial jurisdiction. The legislative history demonstrates that Congress understood that the waiver of fundamental,

structural, Article III trial rights could only be accomplished where the defendant had been informed of his right to insist on the presence of an Article III judge, and had himself voluntarily chosen to waive that right.

Contrary to Congressional intent, the manner in which the magistrate judge obtained "consent" in this case was inherently coercive of the attorney, and made it virtually certain that Petitioner himself neither understood his rights nor realized that his attorney was waiving them for him. The Court can easily avoid such ambiguous "waivers" in the future by requiring, consistent with Congressional intent, that the defendant personally waive his right to an Article III judge at *voir dire*, on the record, after being informed of his right to refuse consent, and by requiring that such refusal would not be held against the defendant.

Finally, the plain error rule does not apply. Petitioner did not "forfeit" his fundamental right to the presence at his felony trial of a judicial officer authorized to preside by failing to assert such right, where his claim is that this right is of such a fundamental nature that it may not be lost absent the defendant's own personal, knowing and voluntary waiver.

ARGUMENT

THE FEDERAL MAGISTRATES ACT REQUIRES THAT A CRIMINAL DEFENDANT PERSONALLY GIVE KNOWING, VOLUNTARY CONSENT TO THE DELEGATION OF FELONY TRIAL *VOIR DIRE* TO A MAGISTRATE JUDGE

A. A Construction of the Federal Magistrates Act That Permitted a Defendant's Fundamental, Personal Right to the Presence Of an Article III District Judge to Be Waived By the Defendant's Counsel Would Raise a Significant Constitutional Issue of the Type That It Is This Court's 'Settled Policy' to Avoid

In *Gomez v. United States*, 490 U.S. 858 (1989), a unanimous Court, invoking its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question," *id.* at 364 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986)), held that the "additional duties" clause of the Federal Magistrates Act, 28 U.S.C. § 636(b)(3),[2] does not

---

[2] The clause presently reads as follows: "A magistrate judge may be assigned such additional duties as are not

authorize a federal magistrate to conduct felony *voir dire* over a defendant's objection. The Court based this conclusion on "the context of the overall statutory scheme," *id.*, including Congress's omission of felony jury selection from the sections of the Act enumerating the pretrial and trial duties that magistrates may perform. It reasoned that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Id.* at 872.

Two years later, in *Peretz v. United States*, 501 U.S. 923 (1991), the Court, by a bare 5-4 majority, clarified *Gomez*, holding that magistrate-conducted *voir dire* was consistent with the "additional duties" clause so long as the "defendant" consented. Reasoning that there was no Article III issue in such an instance, it did not apply the constitutional avoidance doctrine. Peretz's attorney had twice "consented" to magistrate-conducted *voir dire* on his client's behalf, and in his client's presence, once before the district judge well before trial, and later before the magistrate herself. In the second instance, the attorney assured the magistrate that his client had personally consented. *Id.* at 925. There was nothing in the record to suggest that Peretz himself was unaware of his attorney's conduct

---

inconsistent with the Constitution and laws of the United States."

or of his right to insist upon the presence of an Article III judge. Thus, the Court did not include in its certified questions the issue of whether an attorney's *vicarious* "consent" on behalf of his client would suffice to remove any constitutional issue. Justice Marshall, joined in dissent by Justices White and Blackmun, would have reached this issue and held, as a matter of statutory construction, that the defendant's personal, knowing, and voluntary consent was required. *Id.* at 947 n.6.[3]

This case squarely presents the issue that the *Peretz* majority did not answer. Is there a constitutional issue present where a federal magistrate proceeds to conduct felony *voir dire*

---

[3] Justice Marshall's dissent also argued that *Gomez* required a holding that delegation of felony *voir dire* to a magistrate was not authorized by the Magistrates Act even with consent. Justice Scalia's separate dissent was in "general agreement . . . [that] *Gomez* was driven not primarily by the constitutional problems associated with forcing a litigant to adjudicate his federal claim before a magistrate, but by ordinary principles of statutory interpretation. By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent. The canon of *ejusdem generis* keeps the 'additional duties' clause from swallowing up the rest of the statute." *Peretz v. United States*, 501 U.S. 923, 955 (1991) (Scalia, J., dissenting) (citing *Gomez v. United States*, 490 U.S. 858, 872 (1989)).

without obtaining the defendant's personal, knowing, voluntary consent? If so, then this Court, pursuant to its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues," should construe the statute, as it did in *Gomez*, to preclude such a delegation of Article III authority.

As a threshold matter, amici agree with Petitioner that a federal felony defendant has a personal right to have an Article III judge preside at his trial. In *Schor*, the Court recognized that Article III confers upon a litigant a "personal right" to "an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States." 478 U.S. at 848. The Framers believed that life-time tenure and an irreducible salary were essential to guarantee judicial independence, especially in criminal cases. *See United States v. Hatter*, 532 U.S. 557, 568-69 (2001). Criminal trials are at the "protected core" of Article III's guarantee of independent adjudication by life-tenured judges. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.25 (1982) (plurality opinion).

If a federal felony defendant has a constitutional right to have an Article III judge preside at his criminal trial, then he has a strong constitutional claim to have such a judicial officer conduct the jury selection part of such a trial. *Gomez* recognized that *voir dire* is a "critical stage" of

a criminal trial. 490 U.S. at 873 (citing *United States v. Powell*, 469 U.S. 57, 66 (1984) ("trials generally begin with *voir dire*"); *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (*voir dire* "a necessary part of trial by jury"); *Lewis v. United States*, 146 U.S. 370, 374 (1892) (trial commences at least from the time jury selection begins). *See also Powers v. Ohio*, 499 U.S. 400, 412 (1991) (*voir dire* is a "phase of the trial . . . . The influence of the *voir dire* process may persist through the whole course of the trial proceedings.") (citing *Gomez*, 490 U.S. at 874). The *Gomez* Court rejected application of the harmless error doctrine because it concluded that a defendant's right to have all such "critical stages of a criminal *trial* conducted by a person with jurisdiction to preside" was so "basic." *Gomez*, 490 U.S. at 876 (emphasis added).

A defendant's interest in having an Article III judge preside at *voir dire* is further demonstrated by the Court's "serious doubts that a district judge could review [*voir dire*] meaningfully" if it was conducted in the first instance by a magistrate. *Gomez*, 490 U.S. at 874. The judge presiding at *voir dire* "must rely largely on his immediate perceptions," *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981); the juror's "manner . . . is oftentimes more indicative of the real character of his opinion than his words," *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984). *Gomez* thus reasoned:

> Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner – often, in the federal system, the court – must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial.

490 U.S. at 874-75 (internal citations omitted).[4]

While *Peretz* establishes that a defendant may forego his or her constitutional interest in the presence of an Article III judge at *voir dire*, the decision is consistent with this Court's case law, as well as the text of Article III, under which a

---

[4] The lower courts have recognized that it is virtually impossible for any reviewing court to second guess the judgments of the presiding judicial officer at *voir dire*. *See, e.g.*, *United States v. Perez*, 387 F.3d 201, 205 (2d Cir. 2004) ("The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion.").

defendant has a fundamental right to the presence of such an officer at all critical stages of the trial. The question then becomes, in light of *Peretz*'s clarification: how may that right be waived? For a defendant to waive such a significant constitutional right, amici agree with Petitioner that he must do so personally, voluntarily, and with knowledge of the right he is waiving.

As Justice Scalia has explained: "What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

"For certain fundamental rights, the defendant must personally make an informed waiver." *Hill*, 528 U.S. at 115. These include the right to counsel, *see Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), the right to trial, *see Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), the right to trial by jury, *see Duncan v. Louisiana*, 391 U.S. 145, 158 (1968), and the right to plead not guilty, *see Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

The Court has termed such rights those that "dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49.

They generally are rights "which must be exercised or waived at a specific time or under clearly identifiable circumstances." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). "[C]ourts indulge every reasonable presumption against waiver" of such rights. *Roell v. Withrow*, 538 U.S. 580, 595 (2003) (Thomas, J., dissenting) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

On the other hand, the rights that *counsel* may waive in his discretion or on his client's behalf include rights that generally arise during the course of the trial, such as the rights to object to the admission of evidence, to proffer evidence, or to raise issues related to the manner in which the prosecutor or the court is conducting the trial. *See Hill*, 528 U.S. at 115.

The defendant's personal right to a life-tenured, independent Article III judge presiding at the "critical" *voir dire* stage of trial is one of those basic structural rights that may be validly surrendered only through the defendant's own "informed waiver." This necessarily follows from the fundamental nature of the right under Article III. It is a right that "dictate[s] the procedure[] by which [a] . . . criminal matter[] must be tried." *Schor*, 478 U.S. at 848-49. It is the type of right that "must be exercised or waived at a specific time or under clearly identifiable circumstances." *Barker*, 407 U.S. at 529. It is not the type of right that arises suddenly at trial

and requires an instantaneous professional judgment.

Indeed, under a traditional cost-benefit due process analysis, there is every reason to require a personal, on-the-record waiver to ensure it is knowing and voluntary, and virtually no reason not to, since the cost in judicial or governmental resources would be nil. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 Pa. L. Rev. 473, 514 (1978) ("diminution in protection" against an "uninformed or unintentional relinquishment of a protected right" may be justified only when a formal waiver procedure is "infeasible, or involves substantial costs to the functioning of the legal system").

Therefore, this Court, as in *Gomez*, should adopt a readily available alternative construction of the FMA that presents no constitutional issue, and hold that the personal, knowing, voluntary consent of the defendant is required.

B. Congress Believed That Article III Required A Criminal Defendant's Personal Consent, Given Knowingly and Voluntarily, Before Critical Criminal Trial Functions Could Be Lawfully Delegated to a Magistrate

Regardless of whether the *Constitution*, as now construed by the Court, requires that a defendant

personally, knowingly, and voluntarily waive his Article III rights before a magistrate judge may validly preside at a critical stage of a felony trial such as *voir dire*, *Congress* certainly believed there had to be such a requirement when it enacted the relevant provisions of the FMA. Indeed, Congress "circumscribed" magistrates' authority, not only due to its understanding of "constitutional constraints," but also "in the interests of policy." *Gomez*, 490 U.S. at 872. Having withheld from magistrate judges the authority to preside at any critical stage of a felony trial, and having empowered such lesser officers to preside at misdemeanor or petty offense trials only with the criminal defendant's personal, explicit, knowing and voluntary consent, Congress could not possibly have intended magistrates, as an "additional duty" under 28 U.S.C. § 636(b)(3), to preside at felony *voir dire* without, at the very least, obtaining a similar quality of personal consent from the defendant.

1. The Congress That Enacted the Original Magistrates Act in 1968 Believed That a Criminal Defendant Had a Constitutional Right to the Presence of an Article III Officer at Trial and That Waiver of This Right Had to Be Explicit, Personal, Non-Coerced, and With Knowledge of the Right Being Waived

As Justice Stevens' opinion in *Gomez* recounts, when Congress enacted the FMA in 1968, it limited magistrates' trial power to bench trials of minor criminal offenses in which "the defendant, *in writing, specifically waived* his or her rights to trial before a judge and perhaps by a jury." 490 U.S. at 866 (citing 82 Stat. 1116, 18 U.S.C. § 3401(b) (1964 ed., Supp. IV) (emphasis added)). Congress enacted this provision after extensive debate about and legal analysis of the Article III and due process interests at stake. It viewed the defendant's explicit, voluntary consent to magistrates' exercise of criminal trial jurisdiction as essential to the Act's constitutionality.

During the extensive hearings that preceded the FMA's enactment, Assistant Attorney General Vinson testified that "only article III judges may be empowered to conduct trials of Federal criminal offenses, including minor offenses," and that this was a matter of "subject-matter jurisdiction" that a defendant "cannot waive." H.R. Rep. No. 90-1629

(1968), 1968 U.S. Code Cong. & Admin. News 4252, 4264. These objections caused the House Subcommittee on Improvements in Judicial Machinery to commission an influential staff legal memorandum which convinced the Senate and House Judiciary Committees that "it is constitutionally permissible to entrust the trial of minor offenses to U.S. magistrates *under the conditions set forth in S. 945*." *Id.* (emphasis added). One such condition was "the defendant's election to be tried before a magistrate rather than a judge of the U.S. district court." *Id.*

The legislation's principal Senate sponsor, Senator Joseph Tydings, reiterated in testimony before a subcommittee of the House Judiciary Committee that the Justice Department's concern about the legislation's constitutionality had been met by inclusion of a provision for "knowledgeable waiver by the accused of his right to jury trial before the district court. The magistrate is required by the terms of the act to give the defendant a careful explanation of the right to elect trial in the district court, and of his possible right to demand jury trial in that court [depending upon the seriousness of the offense]." *Federal Magistrates Act: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong. 72-73 (1968). Senator Tydings noted that, in view of the strict written waiver provisions that had been included in the Act, the

Justice Department was reevaluating its position. *Id.*

During the lengthy floor debate, Representative Cahill vigorously opposed as unconstitutional the creation of the post of "assistant judge" appointed by the district court as opposed to the President and lacking the independence afforded by life tenure and an irreducible salary. 114 Cong. Rec. 27338 (1968). He questioned the fairness of requiring a defendant to *request* "what is a constitutional right to be tried by an article III judge." *Id.* A legislative sponsor, Representative Poff, countered that various "safeguards" had been built into magistrates' exercise of trial jurisdiction, including limiting such jurisdiction to select "minor offenses," and requiring a rigorous consent procedure:

> The magistrate will be required to give every defendant brought before him a careful explanation of his right to elect trial before a judge of the district court . . . . S. 945 specifically forbids the magistrate to proceed to trial unless the defendant, having heard the magistrate's explanation, executes a written election to be tried before the magistrate and a written waiver of whatever jury trial rights he has.

Id. at 27341.

Representative Poff reasoned that the due process clause permitted a defendant to waive his right to trial before an Article III judge and compared this right to "analogous rights guaranteed by the Constitution, such as the right to trial by jury, the right to grand jury indictment, and the right to a speedy trial." *Id.* at 27342. Of course, these are fundamental rights that this Court's decisional law had recognized were personal to the defendant and had to be waived personally. *See* pp. 14-16, *supra*.

Representative Poff continued: "The intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case – all show a statutory intent to preserve trial before the district judge as the principal – rather than an elective or alternative – mode of proceeding in minor offense cases." *Id.* at 27342, *quoted in Gomez*, 490 U.S. at 872 n.24.

2. **In Amending the Act in 1976 to Clarify Magistrates' 'Additional Duties,' Congress Did Not Relax the Stringent, Written Consent Requirement for Magistrates to Exercise Criminal Trial Jurisdiction**

In 1976, Congress amended the FMA to "clarify and further define the additional duties which may be assigned to a United States

Magistrate." *Gomez*, 490 U.S. at 867 (quoting H.R. Rep. No. 94-1609, at 2 (1976), 1976 U.S. Code Cong. & Admin. News. 6162). The amended act provided more detail about the pre-trial, post-trial, and administrative functions magistrates could perform, and also retained the residual "additional duties" clause, § 636(b)(3), but did not alter or expand the statute's explicit, written consent provisions for the trial of minor criminal matters. *See generally Gomez*, 490 U.S. at 868-69 & nn. 14-16. Nor did the amended statute enlarge the range of alleged criminal violations that magistrates would have jurisdiction to try.

The legislative history makes clear that Congress's principal purpose continued to be to encourage district courts to use magistrates to resolve, or to assist the district court in resolving, less substantial matters so that district judges would be free to concentrate on their core Article III function of trying cases. *See Gomez*, 490 U.S. at 869-70, 872.

3. In Expanding Magistrates' Criminal And Civil Trial Jurisdiction in 1979, Congress Reiterated Its Requirement That Consent Be Personal, Knowing, And Truly Voluntary

In 1979, Congress enlarged magistrates' criminal trial jurisdiction, but made clear that it continued to view the criminal trial as the Article III function to which the strictest waiver rules must

apply. While it provided for expanded misdemeanor trial jurisdiction, including over jury trials, and for magistrates to try civil cases, it continued the statute's explicit, written, personal consent requirement for criminal trials only. It made clear as well that a criminal defendant may not be required to assert his right to an Article III judge at trial or lose it; a knowing, intelligent, voluntary waiver, made personally by the defendant, remained necessary.

In construing the 1979 amendments, this Court noted that, for both civil and criminal trials, "[a] critical limitation on [magistrates'] expanded jurisdiction is consent." *Gomez*, 490 U.S. at 870. In civil matters, "[a]s amended in 1979, the Act states that 'neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.'" *Id.* (quoting 93 Stat. 643, 28 U.S.C. § 636(c)(2)). However, in criminal matters, the Court noted, "the magistrate's criminal trial jurisdiction depends on the defendant's specific, *written* consent." *Id.* at 871 (emphasis added).

Significantly, Congress used waiver rules not only to distinguish between civil and criminal litigants' rights to the presence of an Article III judge, but also to differentiate the respective interests of a criminal defendant and the Government. As the Court has noted, under the 1979 amendments, if the Government wishes to assert its

Article III interest in *voir dire* by the district judge, it must affirmatively petition the court to grant its request. However, a defendant may stand on his or her Article III rights: a magistrate lacks "criminal trial *jurisdiction*" over misdemeanors absent the "defendant's written consent." *Gomez*, 490 U.S. at 871 (citing 18 U.S.C. § 3401(b)) (emphasis added).

The 1979 legislative history makes clear that, to the extent Congress intended to empower magistrates to preside at a criminal trial at all, it intended to require that the exercise of such authority be preceded by a strict Article III waiver made personally by the defendant. The House Judiciary Committee equated the waiver of the right to trial before a district judge to waiver of other fundamental, structural rights that "the accused may consent to waive . . . as long as the answer is willingly and knowingly made." H.R. Rep. No. 96-287, at 8 n.20 (1979). Invoking the constitutional waiver standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the House Report stated: "[W]aiver of the right to be tried by the district court is a critical stage of the proceedings requiring the presence and advice of counsel, unless also waived." *Id.* at 18.

The Senate Report reasoned that the elimination of a written waiver requirement for petty offenses would be constitutional, but nevertheless retained it, as a matter of policy, because of the need

for "further empirical evidence of how the magistrates system works." S. Rep. No. 96-74, at 6 (1979), 1979 U.S. Code Cong. & Admin News 1469, 1474. Meanwhile, the report emphasized that for *misdemeanors*, "[i]t is expected that this waiver should be considered a critical stage requiring the opportunity to consult counsel, as should the decision to proceed before a magistrate in more serious petty offense cases where there is a significant possibility of punishment by imprisonment." *Id.* at 7, 1475. Reiterating Congress's intent that consent to trial before magistrates in all cases be genuinely voluntary, the report continued: "The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrate." *Id.* at 13, 1481.

C. Having Limited Magistrates' Criminal Trial Jurisdiction to Misdemeanors, and Insisted That Such Jurisdiction Be Exercised Only When the Defendant Gives Personal, Knowing, Voluntary Consent, Congress Could Not Possibly Have Intended District Courts, Pursuant to the 'Additional Duties' Clause, To 'Experiment' With Delegating *Voir Dire* in *Felony* Trials Without Obtaining Comparable Consent

In *Gomez*, the legislative history of the FMA, together with its overall structure, convinced this

Court that Congress had made "an implicit withholding of the authority to preside at a felony trial," a point it noted the government had conceded. *Gomez*, 490 U.S. at 872 & n.22. The Court observed that, whenever Congress did intend to create criminal trial jurisdiction for magistrates, it applied a strict constitutional waiver standard. Having so carefully linked magistrates' trial jurisdiction to the obtaining of a criminal defendant's explicit, personal consent, Congress could not have intended "constructive experiments" under the general "additional duties" clause, *see Peretz*, 501 U.S. 932-33, to include delegation to magistrate judges of felony *voir dire*, a critical stage of trial,[5] without equivalent procedural safeguards.

As demonstrated above, both the Congress that enacted the original "additional duties" clause in

---

[5] The Court in *Gomez* believed that Congress must have understood that *voir dire* was part of the trial. Besides citing its own decisions, beginning with *Hopt v. Utah*, 110 U.S. 574, 578 (1884), holding that jury selection is part of trial, *see Gomez*, 490 U.S. at 873, the Court pointed out that Congress had deemed *voir dire* to be part of trial for speedy trial purposes when it passed the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982 ed. and Supp. V), in 1975, just one year before it amended the "additional duties" clause of the Magistrates Act; had placed rules pertaining to criminal petit juries in the "Trial" section of the Federal Rules of Criminal Procedure; and, in Rule 43(a), had included in the notion of "trial" the "impaneling of the jury." *Gomez*, 490 U.S. at 873 & n.26.

1968 and the Congress that amended it in 1976 believed that a criminal defendant has a fundamental constitutional right to a trial before a fully independent district judge (or at least a strong claim to such a right), and that a defendant may forego this right only after a formal, knowing, voluntary, personal waiver. These Congresses evidently believed that the *Government* could be required to assert its Article III right or lose it, but that the *defendant* could stand on his right and retain it unless and until he explicitly and personally waived it. In retaining this differentiation in the 1979 legislation, Congress continued to require written consent in *criminal* matters, even as it adopted a less formal consent requirement for magistrates to exercise *civil* trial jurisdiction.[6]

Significantly, the "consent" process followed in Petitioner's felony trial below would not suffice under the waiver standard for *civil* trials required by

---

[6] In 1996, Congress amended 18 U.S.C. § 3401(b) to permit a criminal defendant's explicit consent to be made orally, on the record, as opposed to in writing, and to permit the district court to explain to the parties in civil cases that they may, but need not, consent to trial by magistrate judge. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 202, 110 Stat. 3847, 3849 (1996) (amending § 3401(b)). Congress continued the requirement in misdemeanor cases that the magistrate judge carefully explain to the defendant his right to trial before the district judge and his right to withhold his consent.

Justice Souter's majority opinion in *Roell v. Withrow*, 538 U.S. 580 (2003). In *Roell*, the Court held that a *civil* litigant's consent could be inferred based upon the district court's repeated warnings, beginning well before trial, that any litigant who did not consent would have a right to trial before the district judge and would not be penalized for exercising such right, and the parties' course of conduct in appearing for trial and not taking issue with the magistrate judge's observation that she had the parties' consent. Justice Souter's opinion agreed with Justice Thomas's dissent (joined by Justices Stevens, Scalia and Kennedy) that, even in a civil case, "notification of the right to refuse [the request of] the magistrate judge is a prerequisite to any inference of consent." *Id.* at 587 n.5. The Court acknowledged Congress's concern that litigants not be subjected to "pressure, tacit or expressed, . . . to induce them to consent to trial before the magistrates." *Id.* at 589 (quoting S. Rep. No. 96-74, at 5 (1979), 1979 U.S. Code Cong. & Admin. News 1469, 1473).[7]

---

[7] The dissenters would have further required express consent, reasoning as follows:

> Reading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also ensures that the parties knowingly and voluntarily waive their right to an Article III judge. A party's express consent is a clear and unambiguous indication that the party had sufficient notice it was freely waiving

In Petitioner's case, the district judge failed to provide the parties prior warning that he intended to delegate jury selection, let alone inform Petitioner of his right to withhold consent. On the afternoon of trial, the magistrate judge appeared, called counsel to the bench, obtained their "consent" even before providing an interpreter for the non-English-speaking defendant, and then began *voir dire*, without ensuring in any manner that Petitioner understood that "waiver" of his constitutional rights was occurring.

If *civil* litigants may not validly waive their Article III rights unless they have been notified of their right to trial before a district judge and their right to refuse consent, and have made clear by their conduct that they in fact do consent, then surely at least as much procedural protection is required under the FMA for a felony defendant to waive his Article III rights during such a critical stage of his trial as *voir dire*. Significantly, Justice Souter, in upholding the implicit consent in *Roell*, contrasted the civil trial provision of the FMA with 18 U.S.C. § 3401(b), under which magistrate judges may preside at *misdemeanor* trials "only if the defendant 'expressly

---

its right.

Roell v. Withrow, 538 U.S. 580, 595 (2003) (Thomas, J., dissenting).

consents . . . in writing or orally on the record.'" *Id.* at 587.

Similarly, if a misdemeanor defendant must consent explicitly, on the record or in writing, after the court has explained to him his Article III rights and his right to refuse to consent, then surely a felony defendant is entitled to at least that much due process before being denied his Article III rights during *voir dire*. "[M]agistrate supervision of entire civil and misdemeanor trials . . . [is] comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Peretz*, 501 U.S. at 933. The procedural protections that Congress intended to protect the Article III rights of civil litigants and criminal defendants charged with petty offenses or misdemeanors must be at least as rigorous where the trial rights of *felony* defendants, some of whom face the prospect of life imprisonment or imposition of the death penalty, are at stake.

D. A Formal Consent Procedure During Which a Criminal Defendant Is Informed of His Right To an Article III Judge, That He May Refuse To Consent to the Delegation of the *Voir Dire* Process to a Magistrate Judge, and That Such Failure to Consent Will Not Be Held Against Him, Is Essential to Effectuate Congressional Intent and to Avoid the Inherent Coercion That Occurred in This Case

The "consent" procedure the district court employed in this case was plainly insufficient under Article III, and demonstrates the need for a bright-line rule requiring the criminal defendant's personal, explicit, truly voluntary waiver of his right to the presence of a district judge at felony *voir dire*, after his receipt of the court's clear statement that he will not be penalized for refusing such consent. Otherwise, as this case illustrates, a waiver process will be inherently coercive, contrary to Congressional intent as well as the Due Process Clause.

In this case, the district court made unmistakably clear its *preference* that the parties "consent" to *voir dire* by the magistrate: on the morning *voir dire* was to begin, the judge did not even show up, but arranged for a magistrate judge to appear in his place. Even before determining whether the defendant spoke English or had the services of an interpreter, the magistrate judge summoned the attorneys to the bench, asked for and

received their "consent," and then immediately commenced *voir dire*. Evidently the jury *venire* was already waiting for the proceedings to begin when the magistrate judge solicited the attorneys' "consent."

This process was coercive. The district court and the magistrate judge apparently assumed that counsel's consent was a foregone conclusion. A refusal to consent would have significantly delayed the proceedings and inconvenienced the district judge, the magistrate judge, and the prospective jurors.

Under such circumstances, a defendant facing a severe sentence for marijuana smuggling (190 months, as it turned out), if not informed of his right to withhold consent, would be hard-pressed to assert his rights and defy the evident wishes of the district and magistrate judges, assuming the Petitioner even knew what was occurring. Here, the evidence suggests the Petitioner had no idea – the "consent" process occurred at the bench, before he had the services of a court-appointed, Spanish interpreter, and the *voir dire* process began immediately thereafter.

Whenever a district or magistrate judge requests a criminal defendant's "consent" to waive his Article III rights at felony *voir dire*, it is implicit that the court prefers this process – otherwise such consent would not be solicited. The pressure will be particularly great on a lawyer who regularly

practices before such court to acquiesce so as not to incur the ill-will of the court which may compromise his effectiveness in this or future cases. "[T]he pressure that an attorney might feel to accommodate the judge's schedule cuts against eliminating a defendant's right to personally consent to or refuse a magistrate judge's jurisdiction over a critical stage of his trial." *United States v. Gamba*, 483 F.3d 942, 954 (9th Cir. 2007) (Fisher, J., dissenting).[8]

---

[8] Such pressures are regularly felt by lawyers who repeatedly appear before the same district court. A Criminal Justice Act panel attorney, Assistant Federal Defender, or private attorney who appears regularly before the same court must struggle against "a strong interest in having judges . . . think well of him" that his client may not share. *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2480 (2004) (noting the pressure on public defenders and "[r]epeat defense counsel" to "choose their battles wisely"); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 Am. Crim. L. Rev. 73, 85 & n.32 (1993) (noting pressure on public defenders to "accommodat[e] . . . the case management and budgetary priorities of the court"); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L. J. 1179, 1238-40 (1975) (noting the effect on some public defenders of "judicial pressures and suggestions" and fear of "reprisals [in] future cases"). In typical situations where this pressure can arise – giving up the right to trial, plea bargaining, and appeal waivers are common examples – settled rules provide procedural protections to the defendant and his counsel. *See, e.g.*, Fed. R.

Congress well understood this danger. It protected against it by requiring that litigants be personally informed of their right to the presence of a district judge and by ensuring that, if they exercised this right, they would not be penalized. *See, e.g.*, 28 U.S.C. § 636(c)(2). Since the Court, in *Peretz*, authorized district courts to "experiment" with delegating felony *voir dire* to magistrates, notwithstanding the Court's recognition in *Gomez* that Congress did not specifically contemplate such delegation, it should incorporate the procedural protections that Congress so plainly thought necessary, under Article III and the Due Process Clause, to make an equivalent delegation of misdemeanor or civil trial authority constitutional.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioner's brief, the judgment below should be reversed.[9]

Crim. P. 11(b)(1).

[9] We agree with Petitioner that the court of appeals erred when it reviewed Petitioner's claim for plain error. As Petitioner argues, correctly in our view, a party does not forfeit his entitlement to complain about denial of a constitutional or statutory right where the right is of such a quality that it may only be lost through the defendant's personal, knowing, voluntary waiver. Moreover, as Justice Scalia reasoned in his dissent in *Peretz*, 501 U.S. at 954-55, the "consent" jurisdiction of a magistrate judge under the FMA could never be reviewed,

Respectfully submitted,

JOEL B. RUDIN
Counsel of Record
200 West 57th Street, Suite 900
New York, New York 10019
(212) 752-7600

JOSHUA L. DRATEL
NAT'L ASS'N OF CRIMINAL
DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, N.W., Suite 950
Washington, D.C. 20036
(212) 732-0707

HENRY J. BEMPORAD
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
Co-Chair, Amicus Committee
727 East Durango Blvd., Suite B-207
San Antonio, Texas 78216
(210) 472-6700

Attorneys for Amici Curiae

JOEL B. RUDIN
(On the Brief)

---

either in a civil or a criminal case, if a party's explicit, contemporaneous objection were required to preserve the claim for appeal.

74

54376

40pgs

No. 06-11612

Supreme Court, U.S.
FILED
NOV 12 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE

RACHEL E. BARKOW
40 Washington Square South
Room 310F
New York, NY 10012
(212) 992-8829

CHARLES J. OGLETREE, JR.*
125 Mount Auburn Street
Third Floor
Cambridge, MA 02138
(617) 495-8285

CARISSA BYRNE HESSICK
1100 S. McAllister Avenue
Tempe, AZ 85287
(480) 965-2007

ROBERT K. KRY
BAKER BOTTS LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-7702

** Counsel of Record for Amicus Curiae*

November 12, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over *voir dire*?

[This page is intentionally left blank.]

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

ARGUMENT 2

I. JURY SELECTION IS OF PARAMOUNT IMPORTANCE IN A FELONY CRIMINAL TRIAL 2

A. The Jury is the Constitution's Cornerstone in Felony Criminal Cases 2

B. The Jury Trial Right Depends on Careful Judicial Oversight of Jury Selection 4

II. THE CONSTITUTION VESTS OVERSIGHT OF CRIMINAL TRIALS IN ARTICLE III JUDGES BECAUSE THEIR INDEPENDENCE PROTECTS INDIVIDUAL RIGHTS 8

III. THE FEDERAL MAGISTRATES ACT SHOULD BE CONSTRUED TO REQUIRE THE EXPRESS, PERSONAL CONSENT OF THE DEFENDANT TO AVOID A GRAVE CONSTITUTIONAL QUESTION 12

A. Allowing Magistrates To Conduct Jury Selection in Felony Cases Presents Grave Constitutional Questions 12

B. This Court's Precedents Mandate Reading the Federal Magistrates Act To Require Express, Personal Consent of the Defendant, On the Record 16

C. Express, Personal Consent of the Defendant, On the Record, Is Required in Contexts Involving Waivers of Similarly Important Constitutional Rights 18

D. Other Actors in the Criminal Justice System Will Not Adequately Protect a Defendant's Right to an Article III Forum 24

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES:

Adams v. Heckler, 794 F.2d 303 (7th Cir. 1986) 20

Aldridge v. United States, 283 U.S. 308 (1931) 6

Apprendi v. New Jersey, 530 U.S. 466 (2000) 4

Batson v. Kentucky, 476 U.S. 79 (1986) 6-7

Blakely v. Washington, 542 U.S. 296 (2004) 3, 4

Brookhart v. Janis, 384 U.S. 1 (1966) 22

CFTC v. Schor, 478 U.S. 833 (1986) 17

Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) 22

Cunningham v. California, 127 S. Ct. 856 (2007) 4

Duncan v. Louisiana, 391 U.S. 145 (1968) 2, 4

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984) 13, 21, 24

Gomez v. United States, 490 U.S. 858 (1989) 5, 16, 17, 20, 21

Ham v. South Carolina, 409 U.S. 524 (1973) 6

Harris v. Folk Constr. Co., 138 F.3d 365 (8th Cir. 1998) 20

Hernandez v. New York, 500 U.S. 352 (1991) 8

J.C. Henry v. Tri-Services, Inc., 33 F.3d 931 (8th Cir. 1994) 19

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 7

Johnson v. Zerbst, 304 U.S. 458 (1938) 22

Miller-El v. Dretke, 545 U.S. 231 (2005) 7

Morgan v. Illinois, 504 U.S. 719 (1992) 4, 5

New York v. Hill, 528 U.S. 110 (2000) 21

Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) 14

Peretz v. United States, 501 U.S. 923 (1991) 15, 17, 20, 25

Pointer v. United States, 151 U.S. 396 (1894) 5

Ring v. Arizona, 536 U.S. 584 (2002) 4

Ristaino v. Ross, 424 U.S. 589 (1976) 6

Rosales-Lopez v. United States, 451 U.S. 182 (1981) 4, 5, 6

Swain v. Alabama, 380 U.S. 202 (1965) 5

Taylor v. Illinois, 484 U.S. 400 (1988) 21, 22

Thompson v. Utah, 170 U.S. 343 (1898) 4

Turner v. Murray, 476 U.S. 28 (1986) 6

United States v. Booker, 543 U.S. 220 (2005) 4

United States v. Gomez-Lepe, 207 F.3d 623 (9th Cir. 2000) 20

United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007) 18, 20

United States v. Marin, 961 F.2d 493 (4th Cir. 1992) 22

United States v. Olano, 934 F.2d 1425 (9th Cir. 1991) (Olano I), reversed on other grounds by United States v. Olano, 507 U.S. 725 (1993) 23

United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964) 23

Uttecht v. Brown, 127 S. Ct. 2218 (2007) 6

STATE CASES:

Doughty v. State, 470 N.E.2d 69 (Ind. 1984) 22

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. art. III, § 1 ..... *passim*
U.S. Const. art. III, § 2 2
U.S. Const. amend. VI 2, 4, 5, 15
U.S. Const. amend. XIV 4

18 U.S.C. § 3401(b) (2000) 19
28 U.S.C. § 631 (2000) 16
28 U.S.C. § 631(b)(2) (2000) 13, 14
28 U.S.C. § 631(e) (2000) 12
28 U.S.C. § 631(i) (2000) 13
28 U.S.C. § 634(b) (2000) 13
28 U.S.C. § 636(b) (2000) 13
28 U.S.C. § 636(c) (2000) 19, 20
28 U.S.C. § 636(c)(4) (2000) 13

FEDERAL RULES:

Fed. R. Crim. P. 7(b) 22
Fed. R. Crim. P. 10(b) 23
Fed. R. Crim. P. 23(a) 22
Fed. R. Crim. P. 58(b)(3) 22
Fed. R. Crim. P. 58(c)(2) 22

OTHER AUTHORITIES:

1 G. Tucker, Blackstone's Commentaries (1803) 10, 11

1 J. Kent, Commentaries on American Law (1826) 10, 11

1 W. Blackstone, Commentaries (1765) 9

3 J. Story, Commentaries on the Constitution (1833) ..... *passim*

3 W. Blackstone, Commentaries (1768) 5, 14

4 W. Blackstone, Commentaries (1769) 2, 5

5 W. Holdsworth, A History of English Law (1927 ed.) 8

12 & 13 Will. 3, c. 2, § 3 (1701) 8

ABA Standing Comm. on Legal Aid and Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 7 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf 26

Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1557 (1988) 7

Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 Cornell L. Rev. 679 (2007)..... 26

H.R. Rep. No. 287, 96th Cong., 1st Sess. (1979)..... 26

H.R. Rep. No. 1629 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252..... 16

J. Alexander, A Brief Narrative of the Case and Tryal of John Peter Zenger (New York 1736)..... 9

Joseph H. Smith, An Independent Judiciary: The Colonial Background, 124 U. Pa. L. Rev. 1104 (1976)..... 9

Lewis F. Powell, Jr., Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1 (1966)..... 3, 5

M. Hale, History and Analysis of the Common Law of England (1713)..... 3

Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich. L. Rev. 63 (1993)..... 7

Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488 (1987)..... 25

Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 1036 (2006) 24

Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, 64 Geo. Wash. L. Rev. 189 (1996) 7

Resolutions of the Stamp Act Congress (1765), *reprinted in* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 270 (Richard L. Perry ed., 1959) 3

Steven Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979 (1992) 25, 26

Supreme Court, 1991 Term—Leading Cases, 106 Harv. L. Rev. 240 (1992) 6

The Declaration of Independence para. 11 (U.S. 1776) 9

The Declaration of Independence para. 15 (U.S. 1776) 3

The Federalist No. 78 (1788) ..... *passim*

The Federalist No. 79 (1788) 10

The Federalist No. 83 (M. Beloff ed., 1987) 3

Theodore Eisenberg, et al., Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty, 30 J. Legal Stud. 277 (2001) 7

INTERESTS OF *AMICUS CURIAE* [1]

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy.

CHHIRJ, through research and litigation, seeks to address various issues of disparity and racial justice. In the present case, CHHIRJ explains why jury selection under the supervision of an Article III judge is important to ensuring a felony criminal trial that is free from racial and other invidious forms of discrimination. At a minimum, the Constitution's framework for jury selection in a felony criminal trial should not be jettisoned in the absence of the express, personal consent of the defendant on the record.

---

[1] The parties have consented to the filing of the brief and their letters of consent have been filed with the Clerk of the Court. *Amicus curiae* states that no counsel for either party authored any part of this brief. No person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. JURY SELECTION IS OF PARAMOUNT IMPORTANCE IN A FELONY CRIMINAL TRIAL

A. The Jury is the Constitution's Cornerstone in Felony Criminal Cases

The right to "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). A criminal defendant's right to a jury trial is the only guarantee included in both the body of the Constitution and the Bill of Rights. Article III, section 2 provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Likewise, the Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

These constitutional provisions codify the English and early American understanding "'[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies.'" *Duncan*, 391 U.S. at 152 (quoting Resolutions of the Stamp Act Congress (1765)). First recognized in the Magna Carta, the right to jury trial has always been a fixture in American society. *See* 3 J. Story, Commentaries on the Constitution § 1773, at 652-53 (1833) [hereinafter "Story"] (jury trial was a "fundamental right" and the Constitution would have been "justly obnoxious to the most conclusive objection, if it had not recognised, and confirmed it in the most solemn terms"); *see also* 4 W. Blackstone, Commentaries 342-44 (1769) [hereinafter "Blackstone"] (jury trial is the "grand bulwark of our liberties"); M. Hale, His-

tory and Analysis of the Common Law of England 252-64 (1713) (jury trial is "upon all Accounts . . . the best Trial in the World"). Each of the colonies with written constitutions guaranteed the right to jury trial, and the First American Congress named it one of the "most essential rights and liberties of the colonists." Resolutions of the Stamp Act Congress (1765), *reprinted in* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 270, 270 (Richard L. Perry ed., 1959). After colonial juries refused to convict for violations of unpopular taxation and trade regulations, the Crown resorted to vice-admiralty courts and courts-martial to obtain convictions. Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 3 (1966). That denial of the right to jury trial was "one of the principal causes of the American Revolution," *id.*, and was one of the grievances listed in the Declaration of Independence. *See* The Declaration of Independence para. 15 (U.S. 1776) ("depriving us in many cases, of the benefits of Trial by Jury"). Indeed, Alexander Hamilton observed of the proponents and opponents to the proposed federal constitution that, "if they agree in nothing else, [they] concur at least in the value they set upon the trial by jury." The Federalist No. 83, at 426 (M. Beloff ed., 1987).

The constitutional right to a criminal jury is an express reservation of power to control the judiciary. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). By ensuring that convictions be based on the judgment of the people, the jury right plays the critical role of preventing government abuse through

criminal prosecution. *See, e.g.*, *Thompson v. Utah*, 170 U.S. 343, 350 (1898); 3 Story § 1773, at 652-53.

This Court has confirmed the importance of the right to a jury in criminal cases on numerous occasions. In the nineteenth-century case *Thompson v. Utah*, 170 U.S. at 349-50, the Court praised the right to jury trial as "one of the principal excellencies of our constitution," and in *Duncan v. Louisiana*, 391 U.S. at 149, the Court found the right to be among those basic rights "fundamental to the American scheme of justice" that are incorporated into the Due Process Clause of the Fourteenth Amendment. More recently, in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has condemned no less than five times legislative efforts to reduce the role of the jury, reaffirming that the right to a jury trial is a "constitutional protection[] of surpassing importance." *Apprendi*, 530 U.S. at 476; *Ring v. Arizona*, 536 U.S. 584, 599 (2002), *Blakely*, 542 U.S. at 305-06; *United States v. Booker*, 543 U.S. 220, 238-39 (2005); *Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007).

B. The Jury Trial Right Depends on Careful Judicial Oversight of Jury Selection

The Sixth Amendment guarantees criminal defendants the right to a trial by an "impartial jury," U.S. Const. amend. VI, and "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire*." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) ("*Voir dire* plays a critical function in assuring the

criminal defendant that his Sixth Amendment right to an impartial jury will be honored."). *Voir dire* is necessary "to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Morgan*, 504 U.S. at 730. Through *voir dire*, the court enforces "a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citations omitted); *see also* Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 7 (1966) ("examination of prospective jurors on voir dire" helps "assure the selection of an unbiased jury"). *Voir dire* has been a crucial stage of the criminal trial for centuries: Blackstone himself emphasized "how scrupulously delicate and how impartially just the law of England approves itself . . . in it's caution against all partiality and biass, by . . . repelling particular jurors, if probable cause be shewn of malice or favour to either party." 3 Blackstone 365-66.

In addition to facilitating the removal of jurors for cause, *voir dire* permits a defendant to exercise the right to peremptory challenges where provided by statute, as in the federal courts. *See Rosales-Lopez*, 451 U.S. at 188. Peremptory challenges permit defendants, as well as the prosecution, to secure a fair and impartial jury. *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *see also Pointer v. United States*, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused."); 4 Blackstone 346-47.

This Court has specifically acknowledged the critical role of *voir dire* in rooting out impermissible

racial prejudice in criminal juries. As early as 1931, the Court held that the "essential demands of fairness" required a trial judge to question prospective jurors with respect to racial prejudice in a case involving an African American defendant. *Aldridge v. United States*, 283 U.S. 308, 310 (1931). The Court has often reiterated this requirement in cases potentially involving "racial issues." *Ristaino v. Ross*, 424 U.S. 589, 597 (1976); *see also Rosales-Lopez*, 451 U.S. at 189 (plurality); *Ham v. South Carolina*, 409 U.S. 524 (1973); *cf. Turner v. Murray*, 476 U.S. 28, 34 (1986).

At the same time, the Court has recognized that the jury selection process may be subject to abuse and that judicial oversight is therefore critical to ensure race-neutral jury selection. Racial discrimination is difficult to discover in the *voir dire* process, as prospective jurors are unlikely to admit to racist attitudes in open court. *The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 240, 246-47 (1992). Thus, this Court has explained that the determination of a prospective juror's racial prejudice "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Uttecht v. Brown*, 127 S. Ct. 2218, 2223 (2007).

The Court has similarly recognized the importance of judicial oversight in the exercise of peremptory challenges to ensure that those challenges are not misused to exclude persons from a jury on account of race or gender. In *Batson v. Kentucky*, for example, the Court held that the Equal Protection Clause forbids prosecutors from exercising peremptory challenges solely to remove potential jurors of the defendant's race. *See Batson v. Kentucky*, 476

U.S. 79, 91 (1986); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (extending *Batson* to peremptory challenges on gender grounds). This Court observed that racial discrimination in jury selection "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Indeed, as the Court presaged in *Batson*, studies increasingly confirm that racial composition may have an effect on the jury's decision. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 75-99 (1993); *see also* Theodore Eisenberg, et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277 (2001); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1557, 1559-60 (1988); *cf. Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 Geo. Wash. L. Rev. 189, 289-90 (1996) (reporting that 40 percent of surveyed African Americans indicated that they believed African Americans were discriminated against in the selection of jurors). To prevent peremptory challenges for impermissible racial reasons, the Court required prosecutors who demonstrate a pattern of striking potential jurors of a particular race to provide a race-neutral justification for those peremptory challenges. The trial judge is in the best position to evaluate the prosecutor's proffered race-neutral reason for striking a prospective juror and "to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). That assessment is also likely to "largely turn on evaluation of credibility," and thus, "[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility

lies peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (plurality opinion) (internal quotation marks omitted).

II. THE CONSTITUTION VESTS OVERSIGHT OF CRIMINAL TRIALS IN ARTICLE III JUDGES BECAUSE THEIR INDEPENDENCE PROTECTS INDIVIDUAL RIGHTS

If juries were the Framers' principal guarantee of fairness in criminal trials, independent judges were a close second. To that end, Article III provides that judges "shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Art. III, § 1. Founding-era sources make clear that the judicial independence secured by life tenure and fixed compensation was seen as indispensable to protect individual liberties, particularly in cases pitting an unpopular minority against an inflamed public, and especially in criminal prosecutions.

At one time, most English judges served at the King's pleasure, and many were dismissed for political reasons (most famously Sir Edward Coke). *See* 5 W. Holdsworth, A History of English Law 350-52, 438-44 (1927 ed.). The Act of Settlement of 1701 ended that practice by requiring that "judges' commissions be made *quamdiu se bene gesserint* [during good behavior], and their salaries ascertained and established." 12 & 13 Will. 3, c. 2, § 3 (1701). Those conditions secured "independence and uprightness of

the judges," "one of the best securities of the rights and liberties of . . . subjects." 1 Blackstone 258.

The Act of Settlement did not apply to the colonies, and disputes recurred throughout the eighteenth century. *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104 (1976). In the notorious 1734 criminal libel prosecution of John Peter Zenger, for example, defense counsel's very first objection was that the presiding judge served "only during Pleasure; whereas that Authority . . . ought to be granted during good Behaviour." J. Alexander, A Brief Narrative of the Case and Tryal of John Peter Zenger 6 (New York 1736). The judge retorted that, although counsel had "thought to have gained a great Deal of Applause and Popularity" by making the objection, he would "neither hear nor allow" it—and, to drive the point home, he disbarred Zenger's lawyers. *Id.* at 8. This and other episodes led to the Declaration of Independence's charge that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). The Framers responded by entrenching life tenure and fixed compensation in Article III, beyond the reach of executive or legislative manipulation.

Hamilton defended those provisions in *The Federalist*: "[A]s nothing can contribute so much to . . . firmness and independence, as permanency in office," life tenure was the "best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." The Federalist No. 78, at 291-92 (1788). Independence was "peculiarly essential" to protect constitu-

tional rights from both executive excess and "encroachments and oppressions of the representative body." *Id.* at 291-93. Nothing but "permanent tenure of judicial offices" would adequately secure "that independent spirit in the judges, which must be essential to the faithful performance" of their duties. *Id.* at 295-96. And "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist No. 79, at 299 (1788).

Early American authors echoed those sentiments. Story saw judicial independence as crucial "to preserve the citizens against oppression and usurpation in civil and criminal prosecutions"; judges "holding their offices for the short period of two, or four, or even six years" would not be "firm enough to resist the will of those, who appoint them, and may remove them" when their term is up. 3 Story § 1608, at 472-73. Kent concurred that judges needed "confiden[ce] of the security of their stations" for "firmness" to stand against those "disposed, from the force of passion, or the temptations of interest, to make a sacrifice of constitutional rights." 1 J. Kent, Commentaries on American Law 275-76 (1826) [hereinafter "Kent"]. And Tucker, too, extolled "absolute independence of the judiciary," which "can never be perfectly attained, but by a *constitutional tenure of office*." 1 G. Tucker, Blackstone's Commentaries app. 355 (1803) [hereinafter "Tucker"].

Judicial independence was thought particularly important to protect political or other minorities. Public passions or prejudices could threaten "serious oppressions of the minor party in the community." The Federalist No. 78, at 296 (1788). It would "require an uncommon portion of fortitude in

the judges to do their duty as faithful guardians of the constitution" where "invasions of it had been instigated by the major voice of the community." *Id.* at 296-97. That fortitude "can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence." *Id.* at 298. As Story succinctly put it: "There can be no security for the minority in a free government, except through the judicial department," and "if the tenure of office of the judges is not permanent," judges would be mere "pliant tools of the leading demagogues of the day." 3 Story § 1606, at 469.

Judicial independence was important "especially in cases where a criminal prosecution may be carried on." 1 Tucker app. 355. "[I]n criminal prosecutions, the executive is in the eye of the law, always plaintiff; and where the prosecution is carried on by it's direction, the purity of the judiciary is the only security for the rights of the citizen . . . , interposing it's shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence." *Id.* at 357. Limited tenure in England had led to "dangerous influence . . . in cases where the claims or pretensions of the crown were brought to bear upon the rights of a private individual." 1 Kent 275. It had "produced the most disgraceful compliances with the wishes of the crown; and the most humiliating surrenders of the rights of the accused." 3 Story § 1602, at 465. "Subserviency to the crown was so general in state prosecutions, that it ceased almost to attract public indignation." *Id.* at 465 n.1. Once "independence of the judges [was] secured by this permanent duration of office,"

however, justice flowed on "with an uninterrupted, and pure, and unstained current." *Id.* at 466.

III. THE FEDERAL MAGISTRATES ACT SHOULD BE CONSTRUED TO REQUIRE THE EXPRESS, PERSONAL CONSENT OF THE DEFENDANT TO AVOID A GRAVE CONSTITUTIONAL QUESTION

A. Allowing Magistrates To Conduct Jury Selection in Felony Cases Presents Grave Constitutional Questions

In light of the foregoing, allowing magistrates to conduct felony *voir dire* strikes at the heart of Article III's guarantees. The practice should be permitted, if at all, only in the most carefully defined circumstances.

Magistrates lack the constitutionally required independence of Article III judges. Most obviously, while Article III judges have *permanent* tenure during good behavior, magistrates are appointed for only eight-year terms (four in the case of part-time magistrates). 28 U.S.C. § 631(e) (2000). In the Framers' view, *any* temporary appointment was inadequate to guarantee independence: "Periodical appointments, *however regulated, or by whomsoever made*, would in some way or other be fatal to [judicial] independence." The Federalist No. 78, at 298 (1788) (emphasis added). Limited tenure poses the inevitable risk that future employment prospects will dull zealous protection of unpopular defendants or vindication of unpopular rights. *See* 3 Story

§ 1608, at 472-73. That is no less true today than it was at the framing.

Magistrates fall short of the necessary independence in other respects as well. Although the Federal Magistrates Act limits grounds for removal, 28 U.S.C. § 631(i) (2000), and purports to prohibit salary reductions, 28 U.S.C. § 634(b) (2000), both provisions are merely statutory and may be altered by Congress at any time. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1039 (7th Cir. 1984); *see also id.* at 1053 (Posner, J., dissenting) ("Congress can reduce [magistrates'] salaries, or abolish their offices (selectively if it wishes) . . . ."). Because Article III's life-tenure and compensation provisions were designed in part to check *legislative* encroachment, *see* The Federalist No. 78, at 291 (1788); 3 Story §§ 1606-07, at 469-71, mere statutory protections are necessarily ineffective substitutes.

Magistrates, moreover, are "beholden to judges as well as to Congress." *Geras*, 742 F.2d at 1053 (Posner, J., dissenting). They cannot be reappointed unless a judge determines that they are "competent to perform the duties of the office." 28 U.S.C. § 631(b)(2) (2000). Judges have broad discretion over which cases to refer. 28 U.S.C. § 636(b) (2000). And references may be vacated in certain cases "for good cause shown." 28 U.S.C. § 636(c)(4) (2000). That extensive control similarly threatens magistrates' independence. *See Geras*, 742 F.2d at 1053 (Posner, J., dissenting).

Those controls are singularly problematic in felony jury selection. As already noted, the Framers thought judicial independence crucial in criminal cases, which pitted the power of government against

the liberties of citizens. Any conduct of criminal trials by officers appointed for a temporary term of years (and who may be removed or impoverished at the whim of Congress in the meantime) imperils the values animating Article III.

Voir dire, in particular, uniquely implicates those concerns. Jury selection has always been crucial to ensuring fairness in the common-law criminal trial. As explained above, the careful process of "repelling particular jurors, if probable cause be shewn of malice or favour to either party," was a defining feature of the common law's "scrupulously delicate" and "impartially just" trial procedure. 3 Blackstone 365-66. Delegating that function to officers who lack constitutionally required independence removes a core component of the common-law trial from direct judicial supervision.

A magistrate who believed jury selection must be done expeditiously—because he is in a district with a large backlog of cases or because that is what the appointing judge expects—might not take as much time to question each juror's impartiality, or might be less willing to entertain challenges for cause. A magistrate presiding over a politically or racially charged trial might think twice about ejecting prominent members of the community from the venire for bias, when his future employment prospects depend on congressional forbearance and a superior's assessment of his "competen[ce]." 28 U.S.C. § 631(b)(2) (2000). *See Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 552 (9th Cir. 1984) (Schroeder, J., dissenting) (observing that district court control "create[s] a severe conflict of interest for the magistrate who is compelled to choose between what the magistrate concludes is

right and the result the magistrate thinks will please the district court").

Those are precisely the sorts of concerns that motivated Article III. The Framers secured judicial independence to protect citizens' constitutional rights. *See, e.g.*, The Federalist No. 78, at 292-93 (1788). Jury selection is fraught with decisions affecting those rights—the Sixth Amendment itself grants the right to an "*impartial* jury," which can only be meaningfully enforced by judicious oversight of *voir dire*. The Framers further thought judicial independence necessary to protect minorities from popular passions or prejudices. *See, e.g.*, *id.* at 296; 3 Story § 1606, at 469. There are few stages in the common-law criminal trial where a judge's careful oversight can better protect a criminal defendant from the prejudices of an inflamed public, or where the failure to discharge those duties conscientiously could lead to more "serious oppressions of the minor party in the community." The Federalist No. 78, at 296 (1788).

Having a magistrate rather than a judge select the jury in a felony criminal trial is utterly foreign to common-law procedure—no less than forgoing the jury entirely and trying a case to the bench. While the law may allow a defendant to consent to these nontraditional methods of determining guilt, *see Peretz v. United States*, 501 U.S. 923 (1991), the grave constitutional questions they present require scrupulous care and, at a minimum, the express, personal consent of the defendant.

B. This Court's Precedents Mandate Reading the Federal Magistrates Act To Require Express, Personal Consent of the Defendant, On the Record

This Court has already addressed the constitutional dangers posed by a sweeping reading of the Federal Magistrates Act, 28 U.S.C. § 631 *et seq.* (2000). In *Gomez v. United States*, 490 U.S. 858 (1989), this Court rejected the Government's claim that a magistrate could conduct *voir dire* in the absence of a defendant's consent. *Gomez* noted this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues," and found that a reasonable interpretation of the Federal Magistrates Act that avoided the constitutional issues raised by the Government's interpretation could "be deduced from the context of the overall statutory scheme." *Id.* at 864. The Court noted that Congress, in passing the Federal Magistrates Act, had intended that district courts retain "the greatest possible scrutiny and control of a magistrate's trial jurisdiction," H.R. Rep. No. 1629, at 21 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4264. The Court explained that jury selection cannot be fully reviewed by examining a transcript or reexamining jurors, so jury selection by magistrates was not consistent with the high level of oversight Congress intended district judges to have over magistrates. In light of this concern, *Gomez* emphasized that it was critical that defendants consent to this scheme. *Gomez*, 490 U.S. at 870 ("A critical limitation on [the expanded jurisdiction of the Federal Magistrates Act] is consent.").

Two years later, in *Peretz v. United States*, 501 U.S. 923 (1991), the Court allowed a magistrate judge to conduct *voir dire*, but once again emphasized the vital importance of consent. *See id.* at 932 (noting that "the defendant's consent significantly changes the constitutional analysis"). While *Peretz* confirmed that a magistrate may conduct *voir dire*, it did not overrule the Court's holding in *Gomez*. *Peretz* reaffirmed the concerns this Court articulated in *Gomez* about the district court's limited ability to review *voir dire* conducted by a magistrate, noting that in many cases *de novo* review by the district court would provide an inadequate substitute for the Article III judge's actual supervision of *voir dire*. *Peretz*, 501 U.S. at 936 n.12 ("We do not qualify the portion of our opinion in *Gomez* that explained why jury selection is an important function, the performance of which may be difficult for a judge to review with infallible accuracy."). Explaining that the defendant's consent significantly changes the constitutional analysis, this Court held in *Peretz* that a magistrate judge can conduct *voir dire* if the defendant affirmatively consents to the magistrate and waives his right to an Article III judge.

This reading of *Gomez* and *Peretz* is further supported by the Court's decision in *CFTC v. Schor*, 478 U.S. 833 (1986). Although the Court in *Schor* permitted a non-Article III tribunal to adjudicate a state law claim, it did so only after concluding that the litigants "had the option" to proceed in an Article III court but "with full knowledge . . . chose to avail" themselves of the non-Article III forum. *Id.* at 850. *Schor* also emphasized that the constitutionality of a given delegation of judicial power to a non-Article III actor depends on "the origins and importance of the right to be adjudicated." *Id.* at 851. The right of a

defendant to an impartial jury is one of the cornerstones of the constitutional framework. At a minimum, then, a defendant must have "full knowledge" of his "option" to have an Article III judge preside over jury selection and his consent to forego that option must be stated on the record before dispensing with this key constitutional protection.

C. Express, Personal Consent of the Defendant, On the Record, Is Required in Contexts Involving Waivers of Similarly Important Constitutional Rights

The issue of what kind of consent is required before a constitutional right can be waived is not new. As the Court of Appeals acknowledged in the decision under review:

> What suffices for waiver depends on the nature of the right at issue. Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

United States v. Gonzalez, 483 F.3d 390, 394 (5th Cir. 2007). The express, personal consent of the defendant on the record is universally recognized as the constitutional minimum in contexts involving waivers of constitutional rights that are on par with the right to an Article III judge conducting *voir dire*.

Congress confronted this issue when it approved the use of magistrates in other contexts. Before a magistrate judge may try a minor offense—a misdemeanor punishable by no more than one year imprisonment or a fine of not more than $1,000, or both—the magistrate must carefully explain to the defendant what is at stake and must obtain an explicit waiver of the defendant's right to proceed before an Article III judge. Specifically:

> The magistrate judge shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge and that he may have a right to trial by jury before a district judge or magistrate judge. The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record.

18 U.S.C. § 3401(b) (2000).

Similar protection is provided civil litigants pursuant to 28 U.S.C. § 636(c). As the Eighth Circuit has observed, "section 636(c) requires a clear and unambiguous statement in the record of the affected parties' consent to the magistrate judge's jurisdiction." *J.C. Henry v. Tri-Services, Inc.*, 33 F.3d 931, 933 (8th Cir. 1994). "Without clear and unambiguous consent, litigants cannot be deemed to have forfeited their right to proceed in front of an Article

III judge." *Harris v. Folk Constr. Co.*, 138 F.3d 365, 369 (8th Cir. 1998). The consent requirement is, in the words of the Seventh Circuit, "the linchpin of the constitutionality of 28 U.S.C. § 636(c)." *Adams v. Heckler*, 794 F.2d 303, 307 (7th Cir. 1986); *see also United States v. Gomez-Lepe*, 207 F.3d 623, 631 (9th Cir. 2000) (concluding that "explicit, clear and unambiguous consent" is necessary to the constitutionality of § 636(c)). A critical part of a felony trial—jury selection—requires at least as much. *See Peretz*, 501 U.S. at 929 n.6 (Marshall, J., dissenting) (noting that "the standard governing a party's consent to delegation of a portion of a felony trial under the additional duties clause should be at least as strict as that governing delegation of a misdemeanor trial to a magistrate").

The Court of Appeals reached the opposite conclusion because it erroneously concluded "that the defendant does not, by waiving his right to have an Article III judge conduct *voir dire*, waive his right to judicial review of those proceedings." *Gonzalez*, 483 F.3d at 394. But, as this Court explained in *Gomez* and reaffirmed in *Peretz*, a defendant does, in fact, waive his right to meaningful review by an Article III judge because of the nature of jury selection. *Gomez*, 490 U.S. at 874-75; *Peretz*, 501 U.S. at 936 n.12. "To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives." *Gomez*, 490 U.S. at 874-75. In addition, the officer conducting *voir dire* "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Id.* at 875. As a result, "no transcript can recapture the atmosphere of the *voir dire*, which

may persist throughout the trial." *Id.* Judge Posner has made a similar point:

> The tone in which the trial judge addresses the jurors, . . . the manner in which he reads or paraphrases the instructions to the jury . . . these discretionary aspects of the trial judge's responsibility are largely beyond the power of an appellate court to correct, yet they can influence a jury's verdict.

Geras, 742 F.2d at 1049 (Posner, J., dissenting). Added to these impediments to review is the fact that district judges lack incentives to reexamine jurors because "the time consumed by such review would negate time initially saved by the delegation [to the magistrate]." *Gomez*, 490 U.S. at 876.

The Court of Appeals ignored these concerns in deciding that a defendant gives up only a "limited" right when he allows a magistrate to conduct *voir dire*. It is precisely because the defendant is waiving effective oversight of *voir dire* by an Article III judge that his or her express, personal consent is so important.

In *New York v. Hill*, 528 U.S. 110 (2000), the Court recognized a dividing line between "certain fundamental rights" that a defendant must waive personally and other trial rights that are waivable by a defendant's attorney as part of the attorney's "'authority to manage the conduct of the trial.'" *Id.* at 114-15 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). An attorney cannot validly waive "basic rights" without the "fully informed and publicly acknowledged consent of the client." *Taylor*,

484 U.S. at 417-18. *Taylor* listed among the rights requiring a defendant's explicit, personal waiver the right to plead not guilty and to confront and cross-examine witnesses (citing *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966)), the right to counsel (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)), the right to a jury trial (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)), and the right to be present at trial (citing *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963)). Similarly, courts have required knowing waiver of a defendant's right to appeal. *See, e.g.*, *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992).

The Court in *Taylor* contrasted "fundamental" rights such as the above with other prerogatives routinely exercised by counsel in order to "manage the conduct of the trial." 484 U.S. at 417-18. The Court explained that "the adversary process could not function effectively if every tactical decision required client approval." *Id.* A criminal defendant's right to have an Article III judge preside over *voir dire* is not a "tactical decision" of the sort routinely exercised by attorneys without the defendant's express assent. It is an important structural protection on the level of other rights that require a knowing waiver.

The Federal Rules of Criminal Procedure provide additional support, as they likewise require a defendant's explicit, personal waiver of certain rights that are comparable in importance to the right to have an Article III judge conduct *voir dire*. These include the right to prosecution by indictment, Fed. R. Crim. P. 7(b), the right to a jury trial, Fed. R. Crim. P. 23(a), the right to arraignment before a district judge, Fed. R. Crim. P. 58(b)(3), the right to venue, Fed. R. Crim. P. 23(a) and 58(c)(2), and the

right to appear at arraignment, Fed. R. Crim. P. 10(b). In all of these instances, the Federal Rules demand waiver by the defendant either in writing or on the record.

Moreover, courts have found similar rights involving the jury to require express waiver, even when the Federal Rules were silent as to the procedure for waiver. Both *United States v. Olano*, 934 F.2d 1425, 1437 (9th Cir. 1991) (*Olano I*), *reversed on other grounds by United States v. Olano*, 507 U.S. 725 (1993) (*Olano II*), and *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964), required express, personal waiver for deviations from Rule 23(b), regarding the number of jurors, and Rule 24(c), regarding alternate jurors.[2] As the court in *Olano I* explained, requiring express personal waiver not only serves to "provid[e] reliable evidence that the defendant has in fact consented," but also "alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of the case." *Olano I*, 934 F.2d at 1437.

A requirement of express waiver in these instances serves to alert the defendant as the stakeholder to the significance, as well as the very existence, of an important trial decision. Given its importance, the oversight of jury selection by an Article III judge certainly stands alongside the other rights that require express, personal waiver.

---

[2] While this Court in *Olano II* overruled the application of the plain error standard in the *Olano I*/*Virginia Erection* line of cases, it did not rule on the waivability of the rights at issue or on the proper procedure for waiver. *See Olano II*, 507 U.S. 725.

D. Other Actors in the Criminal Justice System Will Not Adequately Protect a Defendant's Right to an Article III Forum

The defendant's personal consent is critical because no other actor in the system—not the magistrate, the judge, nor the defense lawyer—will weigh judicial independence against efficiency the same way the defendant will.

Magistrates will obviously discount the need for an independent Article III judge because to do otherwise would undercut the magistrates' own legitimacy.

Although one might think that Article III judges would zealously guard their own constitutional authority, countervailing incentives might push them to accept an incursion on judicial independence. Specifically, because of crushing caseloads, judges might be all too willing to delegate some of their tasks to magistrates, even if it compromises the independence of the judicial function. *See Geras*, 742 F.2d at 1050 (Posner, J., dissenting) (noting that, "since 1960, the caseload of the district courts has tripled and that of the courts of appeals has octupled, and there has not been a corresponding increase in the number of judges" and that "[t]he crisis has caused federal judges to delegate more and more of their work to judicial adjuncts"). Indeed, the demands placed on Article III judges might explain why "the Court has been the least protective of the separation of powers" in cases involving the delegation of judicial power to other actors. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 1036-37 (2006) (noting "the

Court's receptivity to claims that a proposed change in government will yield efficiency gains for the judiciary"); *see also* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 515 (1987) (observing that "the Court seems much more clearly committed to functionalism in examining its own place in the constitutional scheme than in dealing with is ues concerning the other two heads of government" and that one possible explanation "may reflect self-interested relief at being freed of the need to decide matters of routine in litigation-rich times"). This potential conflict explains why "the Constitution guarantees not merely that no Branch will be forced by one of the *other* branches to let someone else exercise its assigned powers—but that none of the branches will *itself* alienate its assigned powers." *Peretz*, 501 U.S. at 956 (Scalia, J., dissenting).

Defense lawyers are also an imperfect surrogate for the defendant because their interests may diverge from their clients'. Unlike the defendant, the defense lawyer is typically a repeat player in the system and may be reluctant to say no to magistrate oversight of *voir dire* to avoid upsetting district judges who want to streamline their dockets. Moreover, the defense lawyer might share the desire for a speedier resolution because of financial and caseload pressures of his or her own. Even when a defendant can afford to retain counsel, in most cases the lawyer is paid a flat fee in advance. Steven Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992). These lawyers therefore have an incentive to resolve the case as quickly as possible to maximize the financial return on their time. The vast majority of criminal cases, moreover, involve indigent defen-

dants with appointed counsel. In most of these cases, appointed defense lawyers are paid either "a flat fee per case, or a low hourly rate coupled with a ceiling on total compensation payable." *Id.* The faster the case proceeds, the better off these lawyers are. Even when an indigent defendant is represented by a public defender, the defense lawyer will have an incentive to move the case along quickly because these offices are woefully underfunded and understaffed. ABA Standing Comm. on Legal Aid and Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 7-10 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport. pdf; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 687-88 (2007) (noting that public defenders in some jurisdictions are responsible for well over one thousand cases per year). The danger that lawyers will agree to magistrate judges simply to save time, regardless of the client's wishes, is therefore particularly great in cases where the defense lawyer is court-appointed and earning a below-market fee. *See* H.R. Rep. No. 287, 96th Cong., 1st Sess. 11 (1979) (reporting that Congress did not intend magistrate judges to become a de facto "poor people's court").

If consent is allowed to trump the important structural values of Article III, at the very least, that consent must come from the only actor who is affected by the real costs of relinquishing the right to have a life-tenured judge conduct *voir dire*. The defendant must personally and expressly decide whether to give up this right.

CONCLUSION

For the aforementioned reasons, *amicus* Charles Hamilton Houston Institute for Race and Justice urges the Court to reverse.

Respectfully submitted,

RACHEL E. BARKOW
40 Washington Square South
Room 310F
New York, NY 10012
(212) 992-8829

CHARLES J. OGLETREE, JR.*
125 Mount Auburn Street
Third Floor
Cambridge, MA 02138
(617) 495-8285

CARISSA BYRNE HESSICK
1100 S. McAllister Avenue
Tempe, AZ 85287
(480) 965-2007

ROBERT K. KRY
BAKER BOTTS LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-7702

* *Counsel of Record for Amicus Curiae*

November 12, 2007